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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1205~~ 123

VIRGINIA WILLYS LUCOM and WILSON C. LUCOM,
Petitioners,

v.

ATLANTIC NATIONAL BANK OF WEST PALM BEACH, FLORIDA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners herein, Virginia Willys Lucom and her husband Wilson C. Lucom, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered on December 10, 1965, is reported at 354 F. 2d 51 and is reprinted in Appendix A hereto, p. 1a, *infra*.

The opinion of the United States District Court for the Southern District of Florida granting summary judgment for the respondent on the basis of res judicata and limitations, rendered on August 8, 1963, is not reported. It is reprinted in Appendix B hereto, p. 9a, *infra*.

For the convenience of the Court, the opinion of the Supreme Court of Florida in *Lucom* v. *Atlantic National Bank*, 97 So. 2d 478, is reprinted as Appendix C hereto, p. 25a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1965. On February 28, 1966, Mr. Justice Black signed an order extending the time for filing this petition for writ of certiorari to and including May 9, 1966. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where, within one year following the final discharge of a guardian of property, a former ward and her husband file a damage action against that guardian in a federal district court in Florida, alleging that the appointment of the guardian was void and was part of a fraudulent scheme to deprive the ward of the use, possession and enjoyment of her property in violation both of the Fourteenth Amendment of the Federal Con-

stitution and state law, is such an action barred under any of the following Florida limitations statutes:

(1) Fla. Stat. § 746.14, permitting actions by former wards against discharged guardians if "commenced within one year from the date of the discharge,"

(2) Fla. Stat. § 95.11(5), permitting an action for relief grounded in fraud if commenced within three years after the discovery of the facts constituting the fraud, particularly where the court precludes the use of newly discovered evidence of fraud and precludes a jury determination of when the facts were discovered, or

(3) Fla. Stat. § 95.11(4), permitting an action for relief not otherwise specifically provided for, if commenced within four years?

STATUTORY PROVISIONS INVOLVED

Florida Statutes Annotated:

95.11. Limitations upon actions other than real actions. Actions other than those for the recovery of real property can only be commenced as follows:

. . . . . .

(4) WITHIN FOUR YEARS.—Any action for relief not specifically provided for in this chapter.

(5) WITHIN THREE YEARS.—

. . . . . .

(d) An action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

746.14. Order of discharge. Upon the consideration of the application for discharge and of the

objections thereto, if any, and of the evidence, if the county judge is satisfied that the guardian has faithfully and completely discharged his duties and has rendered complete and accurate final returns and has delivered the assets of the ward to the person entitled thereto, the county judge shall enter an order of discharge. Such discharge shall operate as a release from the duties of the guardianship and as a bar to any suit against said guardian or his surety, unless such suit is commenced within one year from the date of the discharge.

STATEMENT OF THE CASE

On October 9, 1962, the petitioners herein[1] filed a complaint in the United States District Court for the Southern District of Florida. The complaint sought damages from the respondent Atlantic National Bank, as a former guardian of property, in the amount of $1,250,000 stemming from an alleged wrongful taking, misuse and deprivation of use of the petitioner wife's property. R. I 8-11.[2] The claimed damages were later raised to $2,050,000 compensatory and $5,000,000 punitive. Jurisdiction was alleged on the basis of diversity of citizenship and the existence of a federal question under the Fourteenth Amendment. R. I 8.

The basic cause of action, as stated in the amended complaint, was twofold in nature: (1) the guardianship, being absolutely void under Florida law, had

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[1] The petitioner wife, Virginia Willys Lucom, is the daughter of the late John North Willys, founder of the Willys Overland Motor Co. The petitioner husband, Wilson C. Lucom, is the former Deputy Chief of Mission, United Nations Relief and Rehabilitation Administration. They were married in May 1954.

[2] References to three-volume printed record appear herein as renumbered by the Clerk of the Court of Appeals: R. I, R. II, and R. III.

damaged the petitioner wife in the use, possession and enjoyment of her property; and (2) the guardianship, being an integral part of a conspiracy to deprive the petitioner wife of the full use of her property by having her declared mentally ill and incompetent, had resulted in gross humiliation, embarrassment and distress to the petitioners. R. I 18-19, 279-281. A second and previously undiscovered conspiracy, as revealed by subsequently discovered evidence, was said to involve a plan to incarcerate the petitioner wife in a mental institution and to annul her marriage to the petitioner husband. This scheme, joined in by the respondent bank and the petitioner wife's children, occurred at a time when the respondent bank concededly knew that the petitioner wife was competent and able to manage her own property. R. II 135-141, 169, 266-270; R. III 401-407.

The various events leading to the judgment below that the action was barred by Florida limitations law may be summarized as follows:

(1) In 1952, prior to the events involved in this action, the petitioner wife's son—John de Aguirre—had requested and received $50,000 from her to start a new business for himself. He then demanded large additional amounts of money from her to save his failing business interests, causing her mental distress. After her refusal to accede to such demands, the son began efforts to seize control of her financial affairs by having her declared mentally incompetent. R. I. 480-487. These efforts resulted in a declaration of incompetency by a Florida judge in 1952, the appointment of guardians of her property, and her short confinement in Philadelphia Hospital for Mental Diseases in Philadelphia, Pa. Following her release she was declared

competent and the guardians were discharged. See R. I 45, 484-488. And upon her release, the son renewed his demands for money, leading to the events here involved.

(2) In September 1953, the petitioner wife was sui juris and a resident of and a substantial property owner in Florida. At that time, as a part of the son's continuing plan to gain control of his mother's property and to secure the money he needed, the petitioner wife was induced by "friends" to accompany them to New York on a pleasure trip. When the plane arrived in Newark, New Jersey, they went by automobile not to New York but to Philadelphia, where the petitioner wife was taken against her will to the mental hospital where she had previously been. R. I 368. After her incarceration there, the son continued to demand $75,000 from her; upon her refusal he succeeded in obtaining $10,000 without her authority from her brokerage account in New York. The same Florida law firm which represented the son in these various efforts to obtain money from the petitioner wife also became counsel to the respondent bank when it was later appointed guardian of the petitioner wife's property interests. R. I 110; R. II 357.

(3) In the meantime her "friends" ostensibly sought her release from the mental hospital, pursuant to a pre-determined plan to institute a non-adversary and non-contested proceeding wherein a declaration of mental incompetence would be made. They accordingly filed a habeas corpus petition in the Common Pleas Court in Philadelphia. That court, without any citation or notice having been given the petitioner wife, denied the writ and found her mentally ill and in need

of hospitalization within the definitions of the Pennsylvania Mental Health Act of 1951. R. I 50. But the court, while noting the importance of protecting the petitioner wife's property and being advised that "proceedings in Florida have been instituted to achieve this end," R. I 50, declined to find her incompetent to manage her own affairs.[3] This Pennsylvania habeas corpus proceeding was for the stated purpose of obtaining an ex parte adjudication of incompetency—which the court refused to make—as a foundation for the appointment of a guardian of her property in Florida in violation of the requirements of Florida law requiring incompetency to be adjudicated in an adversary proceeding. R. I 181; R. II 308-309, 447, 450, 456.

(4) Shortly thereafter, on October 7, 1953, the County Judge of Palm Beach, Florida, entered an order appointing the respondent bank as guardian of the property of the petitioner wife. R. I 52. This

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[3] The Pennsylvania Mental Health Act does not define mental illness as the equivalent of mental incompetency or to include one's incapacity to manage one's affairs. And the Pennsylvania court had declined to find her incompetent or incapable in that sense

"Mental illness" is defined in that Act to mean only an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care; the term "mental illness" includes "insanity," "mental disease," "mental disorder" and all other types of mental cases, but does not include "mental defectiveness." Pa. P.L. 141, June 12, 1951, § 102(11).

As the Court of Appeals below remarked (see p. 2a, *infra*), "An adjudication of 'incompetency' would necessarily have been under a different statute"—i.e., Pa. P.L. 158, June 28, 1951, § 102(3), which defines an "incompetent" to be one who, because of mental illness or deficiency, is unable to manage his property.

order was based upon a petition filed by the wife's two children, which petition (a) stated under oath that she was a permanent resident of Florida, at a time when she was a patient in a mental hospital in Philadelphia, (b) stated that she had been found mentally ill within the definition of the Pennsylvania Mental Health Act, (c) failed to allege any prior adjudication of incompetency in Florida or any other State, as required by Fla. Stat. §§ 744.31 and 744.19, (d) requested that a guardian be appointed to manage her property, alleged to be of the value of $1,750,000, and (e) waived any preferential right to such appointment in favor of the respondent bank. R. I 53.

(5) The appointment order, however, was erroneously premised on the theory that the petitioner wife was a "non-resident incompetent," despite the knowledge of all concerned that the petitioner wife was a Florida resident who had not been judicially declared to be mentally incompetent. See R. II 310-311. And no attempt was made to comply with the requirements of Florida law that a separate incompetency proceeding in Florida precede any appointment of a guardian of the property of a Florida resident.[4] Nor was there any compliance with the provision of Florida law that the appointment of a resident guardian for the property of a "nonresident incompetent" be preceded by a separate incompetency proceeding and determination

[4] Fla. Stat. § 744.31 states, as respects Florida residents, that no guardian of person or property of one alleged to be mentally incompetent "can be appointed until after such person has been adjudicated to be incompetent in separate proceedings instituted for that purpose in accordance with §§ 394.20 to 394.22, inclusive, relating to the adjudication of incompetency." No such "separate proceedings" were ever instituted as to the petitioner wife.

in the state of domicile,[5] the Pennsylvania court having declined to make such a determination. Under these circumstances, there having been no prior adjudication of mental incompetency in any State, Florida law (Fla. Stat. § 744.31) absolutely forbids the appointment of a guardian of property and renders any such appointment null and void.

(6) Upon an ex parte motion by the respondent bank to cure the erroneous factual basis of the appointment order, the County Judge on November 17, 1953, entered an order declaring that the petitioner wife at all relevant times had been a legal resident of Florida and striking from the record and from the appointment order any and all references to her being a "nonresident" of Florida. R. I 56-58. This order also noted, correctly, that she had been adjudicated to be mentally ill by the Common Pleas Court in Pennsylvania. But this order did nothing to cure the voidness of the appointment order stemming from the absence of a prior adjudication in Florida of mental incompetence.

(7) No appeal was taken by the petitioner wife from the void appointment order as corrected, the appeal period having elapsed while she was still incarcerated against her will in the mental hospital in Phila-

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[5] Fla. Stat. § 744.19 requires that a petition for the appointment of a resident guardian for property of a "nonresident incompetent" be accompanied by "a duly certified or exemplified copy of the adjudication of unsoundness of mind or of physical incapacity from the qualified authorities in the state, territory or country where such incompetent is domiciled."

delphia.[6] But at a later date, after the petitioners herein were married, the appointment order was attacked collaterally in the process of protesting the allowance of compensation to the guardian and its attorneys. The County Judge who had issued the appointment order reserved ruling on, and never did specifically resolve, the claim that the order was void under Florida law. He overruled generally all objections and proceeded to award compensation. This compensation order, as indicated below, was appealed to the Florida Supreme Court.

(8) On May 25, 1955, the County Judge overruled petitioners' objections to the respondent guardian's accounting and to the allowance of compensation. He entered a conditional order approving certain of the guardian's accounts that had been submitted for stated periods from May 31, 1954, to and including May 24, 1955,[7] and reducing from $140,000 to $65,000 the amount of compensation payable to the guardian and its attorneys. R. I 85-87, 465. That order provided that the guardian would be released and discharged by a subsequent order only after the compensation had been paid and the property returned to the ward. But the payment of compensation was stayed pending an appeal first to a Circuit Court and then to the Supreme Court

[6] The petitioner wife had also been advised by the guardian ad litem that the Florida proceeding "in no way attempts to have you declared incompetent, so you will not have the heartbreaking experience of going through the red tape to be restored to your civil rights when you are well." R. I 315.

[7] That this was not a final accounting, permitting a final and unconditional discharge, is shown by the fact that a "Supplement to Final Accounting," exhibiting debits and credits and the balance on hand as of October 5, 1961, and covering the period from May 24, 1955, to October 5, 1961, was filed on October 10, 1961. R. I 121-124.

of Florida. R. I 214-215. Such compensation was not finally determined and paid until June 1961, when the Supreme Court of Florida authoritatively determined that the fees should be further reduced. *Lucom* v. *Potter,* 131 So. 2d 724; R. I 167.

(9) In the meantime, the petitioner wife established residence in New York following her release from the mental hospital in December 1953 and her marriage to the petitioner husband in May 1954. In October 1954 she was adjudicated by a New York court to be competent to manage her person and property, thereby releasing her New York bank and brokerage accounts that had been tied up as a result of the Florida guardianship. R. I 67.

(10) On September 20, 1957, after the County Judge's order had been affirmed by the Circuit Court (R. I 98), the Supreme Court of Florida affirmed with modifications the accounting and the order awarding compensation to the guardian; but the order awarding fees to the guardian's counsel was reversed and remanded. *Lucom* v. *Atlantic National Bank,* 97 So. 2d 478 (Fla.); see Appendix C hereto, p. 25a, *infra.* Conceding that there was "some merit" to the contention that the adjudication of mental illness is not the equivalent of an adjudication of incompetency insofar as property management is concerned, the Florida court expressly refrained from adjudicating the validity of the appointment. It merely held that the respondent bank was at least a guardian de facto and as such was entitled to compensation for services rendered in good faith, whether the guardianship was valid or invalid. But the cause was remanded for a complete redetermination of the compensable services rendered by the attorneys.

(11) Further controversy as to the amount of attorneys' fees ensued on remand, culminating in a second appeal to the Supreme Court of Florida. *Lucom* v. *Potter,* 131 So. 2d 724 (Fla.); R. I 167-173. That appeal, resolved in June 1961, resulted in a substantial reduction of the contested fees. R. I 173. Then and only then were the fees actually paid to the guardian and its attorneys.

(12) On October 10, 1961, the respondent bank filed a "Supplement to Final Accounting" covering the management of the property from May 24, 1955, to October 5, 1961 (R. I 121-124). This report indicated that various amounts, totalling $2,220.57, had been debited and credited to the estate over that period of time.

(13) Following the receipt of this final accounting, the County Judge of Palm Beach County on October 11, 1961, entered an order finally discharging the respondent bank as guardian of the petitioner wife's property. R. I 129-130. This order recited that the conditions set forth in the conditional order of May 25, 1955, "have since been complied with." R. I 129. This was a reference, of course, to the payment of compensation to the guardian and its attorneys following the June 1961 decision of the Supreme Court of Florida in *Lucom* v. *Potter,* 131 So. 2d 724. And, in language virtually identical to that in Fla. Stat. § 746.14, the order recited that the guardian had "faithfully and completely discharged" its duties and "rendered complete and accurate final returns and has delivered all assets of the ward to the ward." R. I 129-130. But in fact the respondent bank still has not, by its own admission, returned to the petitioner wife a $15,000 check of hers which the bank had acquired as guardian, a

matter which has subjected her to a still-pending law suit in New York. R. II 206, 209, 212.

Within one year following this "final" discharge—i.e., on October 9, 1962—the petitioners filed their complaint in the instant proceeding in the federal district court for the Southern District of Florida. R. I 8, 15. The timeliness of this filing was predicated on (1) the provisions of Fla. Stat. § 746.14, which provides that a suit against a discharged guardian may be brought "within one year from the date of the discharge," and (2) the provisions of Fla. Stat. § 95.11, which provides for a four-year limitation period for actions not otherwise "specifically provided for." Petitioners' theory was that neither of these limitations periods could begin to run until the final accounting was approved and the guardian finally discharged in October 1961.

Various proceedings then ensued in the District Court, the most relevant of which led to the entry of a summary judgment in respondent's favor. See Appendix B hereto, p. 9a, *infra*. The District Court, after finding that there were no genuine issues of material facts, held that the petitioners' claims were barred as a matter both of (1) res judicata, the prior decision of the Supreme Court of Florida (*Lucom* v. *Atlantic National Bank*, 97 So. 2d 478) having determined that the guardianship was valid on a de facto basis,[8] and (2) Florida limitations law, the special limitations period provided by Fla. Stat. § 746.14 not operating to super-

[8] The District Court misinterpreted the opinion of the Supreme Court of Florida as determining that the guardianship proceedings were not void for lack of federal due process. But the opinion of the Supreme Court, see Appendix C hereto, reveals no such ruling; indeed, it did not even discuss such a point, which had not been raised or presented before it.

cede or toll the general limitations periods provided by Fla. Stat. § 95.11.

Among other orders entered by the District Court was one denying petitioners relief from the summary judgment insofar as it related to the portion of the complaint charging fraud and conspiracy. R. II 608-609. The motion seeking such relief had been filed under Rule 60(b) of the Federal Rules of Civil Procedure and was premised on evidence alleged to be both material and newly discovered. And among such evidence, newly discovered in 1963 and 1964, was an exhibit from the records of the respondent bank, indicating that the bank as guardian knew of the plan of the children to have the petitioner wife committed to a mental hospital, to have a guardian of her person appointed while it was already guardian of her property and to have the marriage of the petitioners annulled. R. II 141. Indeed, representatives of the respondent bank actually drew up and signed a petition to accomplish those purposes, R. II 266-269, even though the representatives of the respondent bank were on record at that time that the petitioner wife was eligible to be restored to her civil rights and was "fully competent to take charge of and handle her own affairs," R. II 406-407. This evidence, which flatly contradicted earlier denials that the bank knew of this plan, allegedly showed the bank's involvement in and knowledge of the conspiracy.

The Court of Appeals for the Fifth Circuit affirmed the various orders appealed to it, including the summary judgment order and the denial of the motion under Rule 60(b). See Appendix A hereto, p. 1a, *infra*. The affirmance of the summary judgment order, however, was based solely in terms of the Florida limita-

tions law, the court finding it "unnecessary to decide whether the action is also barred by the prior litigation in the state courts." Footnote 22 of the opinion, p. 8a, *infra*. On the theory that the cause of action accrued no later than 1955, when the conditional order discharging the guardian was entered, the court held that the action was barred under the general statute, Fla. Stat. §95.11, which provides a three-year period for actions involving fraud and a four-year period for actions not otherwise specified. And the court concluded that this action, instituted in 1962 within one year after the final discharge, was not saved by the special Florida statute, Fla. Stat. § 746.14, permitting actions against guardians within one year from the date of the guardian's discharge (which here occurred in 1961). Florida law was construed to mean that if the general limitations period has run, a special limitations period will not operate to allow a suit thus barred under the general limitations statute.

The court further held that the limitations period of three years relative to actions grounded on fraud (Fla. Stat. § 95.11 (5)(d)) had expired since the basic elements of the asserted fraud related to the procurement of the guardianship in 1953 and had been asserted in the collateral attack on the guardianship at that time. The newly discovered evidence as to fraud and conspiracy was held to be largely cumulative and hence equally barred by limitations.

Finally, the Court of Appeals stated that no federal cause of action had been asserted since there was no state action involved and none of the actions complained of were done under color of law. That statement, however, was in the nature of dicta since the decisive and the major matter resolved was the limitations question.

REASONS FOR GRANTING THE WRIT

1. THIS CASE INVOLVES A PROBLEM OF MAJOR NATIONAL SIGNIFICANCE—THE RIGHT OF THOSE ACCUSED OF MENTAL ILLNESS TO DEFEND AND PROTECT THEIR BASIC CIVIL RIGHTS.

While the judgment below is cast in terms of the impact of Florida limitations law upon a diversity suit in a federal court, the basic problem involved is of far greater significance and substantiality. The limitations questions which petitioners ask this Court to review must be assessed, for certiorari purposes, in the context of a problem of major national concern—i.e., the right of those confined for reasons of mental illness to seek to vindicate their civil and constitutional rights.

These petitioners, particularly the petitioner wife, stand here as proxies for literally millions of American citizens suffering mental illness in one form or another, most of whom are too poor or are otherwise unable to seek the vindication of their rights. As demonstrated in 1961 in hearings before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee,[9] the plight of the mentally ill in their effort to preserve and protect their civil and constitutional rights is "the most neglected area in the law" and constitutes a problem of "widespread national concern." In Senator Wiley's words,[10]

> "Let me remind those present here that over 250,000 people are committed to mental institu-

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[9] Hearings before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 87th Cong., 1st Sess., Constitutional Rights of the Mentally Ill, Part 1—Civil Aspects (March 28, 29 and 30, 1961), pp. 1-13.

[10] *Ibid.*, p. 11.

> tions each year, three times as many as are sentenced to State and Federal prisons. About 800,000 patients are kept in mental institutions, more than four times the present prison population. These people are not criminals. Nevertheless in most cases they are held involuntarily and are deprived of civil rights by either law or circumstances."

The mentally ill, like other citizens, are entitled to the full protection of their constitutional rights. See, e.g., *Baxstrom* v. *Herold,* 383 U.S. 107. But too often their efforts to implement those rights, as well as rights purely civil or legal in nature, are either ignored, trampled or lost through the majestic indifference of the law as interpreted by lower courts. These petitioners seek, in this lawsuit, to overcome several vital areas of that indifference, asserting such rights as (1) the right to recover damages for the humiliation and distress of being the victims of unwarranted and conspiratorial "railroading" into mental institutions, whereby property is then taken pursuant to a void guardianship, (2) the right to the full use, possession and enjoyment of one's property absent any determination of incompetency, (3) the right to the procedural due process protections afforded by relevant state law in the appointment of guardians of property, and (4) the right of privacy, including the right to maintain a lawful marriage. See *Griswold* v. *Connecticut,* 381 U.S. 479.

This, then, is no ordinary, run-of-the-mill diversity case. Nor is this a routine claim of invasion of federal rights. It concerns matters which, through historic indifference, remain at the very frontier of our legal system. It concerns matters which involve untold thousands if not millions of American citizens who

have suffered the loss of civil and procedural rights in the rush to incarcerate them in mental institutions.

And when in this context the claim is made, as it is made here, that the federal courts below have ignored, misinterpreted and misapplied state law, and that the parties have been deprived of both federal and state law rights, that claim deserves the most careful attention of this Court. Petitioners are well aware of the traditional reluctance of this Court to review the frequent assertions of misapplication of state law by federal tribunals.[11] But when the basic matters at stake are truly significant this Court has not hesitated to accept such cases for review. See *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 631 (failure to follow applicable state limitations law in damage suit involving collective agreement with interstate railroad); *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (failure to follow state law as to burden of proof where effect of failure deprived plaintiff of jury trial).

The implicit importance of this case, justifying review of the questions presented, is self-evident. To grant review of the judgment below is to insure consideration of matters of basic concern to multitudes of citizens, not just to these two petitioners. Only this Court's authoritative consideration and decision can make certain that state limitations statutes are not being improperly interpreted by federal courts to outlaw efforts by those erroneously charged with being mentally incompetent to secure redress for the wrongs inflicted upon them. Legal technicalities such as limi-

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[11] As stated in *Huddleston* v. *Dwyer*, 322 U.S. 232, 237, "ordinarily we accept and therefore do not review, *save in exceptional cases*, the considered determination of questions of state law by the intermediate federal appellate courts." [Emphasis added].

tations for bringing suit and res judicata are precisely the harsh type of legal impedimenta that, if improperly invoked or interpreted, can most effectively destroy cherished constitutional and civil rights. That is the danger, that is the importance to the great numbers of mentally ill citizens, that justifies review by this Court.

2. THE DECISION BELOW APPLIES FLORIDA LIMITATIONS LAW IN A MANNER INCONSISTENT WITH THE PLAIN LANGUAGE OF THAT LAW, THE PERTINENT FLORIDA DECISIONS AND THE GENERAL PRINCIPLES OF INTERPRETATION ENUNCIATED BY THIS COURT.

By its interpretation and application of several sections of the Florida limitations law the Court of Appeals below has rendered a decision that is flatly contradicted by the plain terms of that law and the relevant Florida decisions; and the decision below is one that violates some of the basic rules of statutory interpretation as laid down by this Court. So gross are these inconsistencies as to call for review and corrective action by this Court. See *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 631.[12]

A. Section 746.14, the Special Limitations Statute

Fla. Stat. § 746.14 quite clearly provides that the final discharge of a guardian of property shall operate "as a bar to any suit against said guardian or his surety, *unless* such suit is commenced within one year from the date of the discharge." [Emphasis added.] And since the instant suit by the former ward and her husband was commenced within one year from the

[12] Certiorari was granted in *Moore* "to review a judgment in which the Circuit Court of Appeals applied a Mississippi statute of limitations contrary to the Mississippi Supreme Court's application of the same statute to the same plea in the same case." 312 U.S. at 631.

date of the respondent guardian's discharge in October of 1961, § 746.14 gives affirmative recognition to the timeliness of the suit.

Without citing any precedent, the Court of Appeals held that § 746.14 was not here applicable since (1) the invasion of petitioners' rights occurred during the guardianship in 1953 or 1954, (2) computing the start of limitations from either of those dates, the action was barred by either the three-year fraud limitation or the four-year general limitation of § 95.11, and (3) the § 95.11 limitation periods having elapsed, § 746.14's one year period following discharge of the guardian cannot apply since under Florida law "when two statutes limit the time in which an action may be brought, both apply and the dilatory litigant is caught by whichever runs first." Appendix A, p. 4a, *infra*. The Court thereby rejected petitioners' contention that under Florida law the limitations of a special statute prevail over those of a general statute.

With all due deference, the Court of Appeals had completely misread and misapplied Florida law with regard to the application of limitations statutes. This error is apparent from the following considerations:

(1) There is no Florida statute or decision, and the court cited none, stating that when two or more limitations statutes may apply the action is barred by whichever statute runs first. On the contrary, Florida adheres to the general rule of statutory construction, as stated in *Adams* v. *Culver*, 111 So. 2d 665, 667 (Fla.),

> "... that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. In this situation, 'the

statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any.' "[13]

In other words, § 746.14 being a special limitations statute governing suits by former wards against discharged guardians, the limitations period of that statute controls over the limitations terms of the more general statute, § 95.11. Particularly is that true where, as here, the special limitations statute was enacted subsequent to and in light of the general limitations statute.

(2) The Florida decisions cited by the court below in support of its theory that the litigant is barred by whichever limitations period runs first simply do not bear out that proposition. The one cited Florida decision that has applied § 746.14 is *Beck* v. *Barnett National Bank,* 142 So. 2d 329 (Fla.). That case held that the special one-year limitation period of § 746.14 barred a suit, based on a cause of action arising during the guardianship, brought by a former ward three years after the final discharge of the guardian.[14] In so

[13] This same canon of construction has been stated and followed in a host of Florida decisions. See, e.g., *Hisgen* v. *Rileigh,* 115 So. 2d 715, 719 (Fla.); *Wade* v. *City of Jacksonville,* 152 So. 197, 199 (Fla.); *City of Miami* v. *State,* 190 So. 744, 784 (Fla.); *Woodley Lane, Inc.* v. *Nolen,* 147 So. 2d 569, 571 (Fla. App.).

[14] The actual holding of the court reads as follows (142 So. 2d at 329-330):

"The complaint in this cause is clearly founded upon charges of negligence or wilful misconduct or omission on the part of the appellee guardian arising out of the fiduciary relationship existing between the guardian and ward. The allegations do not attempt to establish any cause of action

holding, the Florida court rejected the claim of the ward that the three or four year general limitations periods of §95.11 could be used. In a very real sense, therefore, the *Beck* decision holds—contrary to the ruling below—that the specific provisions of § 746.14 prevail over the general provisions of § 95.11. And the *Beck* ruling in no way made the applicability of § 746.14 turn on when during the term of guardianship the actions complained of took place; the timeliness was computed simply from the date of final discharge.

(3) The decisive impact of the *Beck* decision is made even more apparent by reference to an earlier appeal in the same case, *Beck* v. *Barnett National Bank,* 117 So. 2d 45 (Fla. App.), not cited by the court below. There the Florida District Court of Appeals, speaking prior to the injection of the limitations issue, made plain that the *Beck* suit was not one "brought by a ward against his guardian, but one by a former incompetent ward against a former guardian for damages resulting from a breach of duty committed during guardianship and prior to discharge"—thereby making inapplicable "the restrictions placed by law on the right of a ward to sue his guardian during the period of guardianship." 117 So. 2d at 49. And the court further noted, at p. 50, that under Florida law a

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except as to the guardian's acts or omissions during the period of guardianship. The specific language of F.S. § 746.14 provides that discharge of the guardian shall serve as a bar to *any* suit against said guardian unless such suit is commenced within one year from the date of the discharge. There is no allegation of fraud, concealment, or other type of allegation that could serve to suspend the commencement of the running of the statute. The trial court was correct in applying F.S. § 746.14, and entering summary final judgment for the defendant." [Emphasis in original.]

former ward can maintain a suit against his discharged guardian in connection with matters arising at any time during the former guardianship.

It is fair to conclude that the Florida decisions in the *Beck* suit, which in its concept of a cause of action finds an almost exact parallel in the instant suit, make plain that it could only have been brought *after* the final discharge of the guardian, when the restrictions on the ward's right to sue the guardian had been lifted. And the Florida Supreme Court's application to that suit of the time limitations of § 746.14, regardless of when the guardian's irregularities occurred, only reinforces the conclusion that § 746.14 alone controls the timeliness of the suit. The conflict between the decision below and the *Beck* ruling is thus complete and irreconcilable.[15]

(4) The other Florida decisions cited by the court below as dispositive of the limitations question are either totally irrelevant or contrary to the court's thesis. Thus the decision in *Perry* v. *Reichert,* 113 Fla. 125, 151 So. 403, thought by the court below to be "most nearly in point," involved quite different limitations statutes and held only that a special five-year limitations statute was not intended to be applicable to the facts involved, thereby rendering effective the general three-year statute. No attempt was made,

[15] See also *American Surety Co.* v. *Andrews,* 12 So. 2d 599 (Fla.), where the Florida Supreme Court held that suit could be brought, following a guardian's discharge, by a former ward against the discharged guardian for acts done during the guardianship, although the facts showed that the action would have been barred under the general four-year limitations statute had the suit been brought, by necessity or otherwise, prior to the discharge. The decision was rendered prior to the passage in 1945 of the special one-year limitations statute, § 746.14.

however, to enunciate any doctrine that general statutes prevail over special statutes or that the first statute to run necessarily bars any suit.

Another cited decision is *Palmquist* v. *Johnson,* 41 So. 2d 313 (Fla.), which actually stands for a proposition precisely the contrary to that espoused by the court below. In dealing with limitations statutes not here at issue, the Florida court held that a special four-year statute rather than a general seven-year statute applied to a suit by a tax deed owner to recover possession of realty described in a tax deed. In the court's recognition that a special limitations statute, applicable to a given situation, prevails over a general statute is to be found an approach to reconciling such statutes which is directly contrary to the approach taken by the court below.[16] And in the final cited case, *State* v. *Haddock,* 149 So. 2d 552 (Fla.), the court expressly held that a special statute providing for revocation of a probate order within six months thereof controlled over a general statute applicable to revocation of probate generally at any time prior to discharge of the personal representative. Here again is an instance of the special limitations period being held binding in the face of a more general statute, an approach contrary to that indulged in by the court below.

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[16] The *Palmquist* decision also noted, 41 So. 2d at 316, that "It is a duty of the court to find for apparently conflicting statutes a reasonable field of operation which may preserve the force and effect of each statute and cause them to harmonize, if possible, by a fair, strict or liberal construction thereof." But the court below has destroyed the force and effect of the special one-year statute, § 746.14, as to every situation where the general limitations periods have elapsed by virtue of computing them from dates long prior to the guardian's final discharge.

(5) Finally, the rule of the court below that the seeming conflict between general and special limitations statutes is to be resolved simply by computing which statute runs first is directly contrary to the established rule of this Court, *MacEvoy Co.* v. *United States,* 322 U.S. 102, 107, that

> "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' *Ginsberg & Sons* v. *Popkin,* 285 U.S. 204, 208."

This rule has uniformly been followed by this Court in interpreting statutes. See *Fourco Glass Co.* v. *Transmirra Corp.,* 353 U.S. 222, 228-229; *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758; *Townsend* v. *Little,* 109 U.S. 504, 512.

The sum total of the conflicts between the decision below and the Florida law and between the rules of interpretation followed by the court below and by this Court is to throw into utter confusion the limitations law of Florida respecting suits by former wards against discharged guardians. And when that confusion is viewed against the background of the important constitutional and civil rights of the mentally ill, the assertion of which is choked off by the result reached below, the need and appropriateness of invoking this Court's review powers become most compelling.

B. Section 95.11, the General Limitations Statute

The Court of Appeals held, on the erroneous premise that the more general limitations periods of § 95.11 would bar this suit if they had elapsed, that the cause

of action arose either in 1953 or in 1954—thus barring the action either under the three-year fraud section (§ 95.11(5)(d)) or under the four-year general provision (§ 95.11(4)). In so holding, the court below rendered a decision that in several respects conflicts with applicable Florida law and with principles established by this Court.

(1) Under Florida law, as enunciated in the previously described litigation in *Beck* v. *Barnett National Bank,* 117 So. 2d 45 (Fla. App.), and 142 So. 2d 329 (Fla.), a ward can sue his guardian for dereliction of fiduciary duties occurring during the period of guardianship only *after* the guardian has been discharged, the discharge freeing the ward of previous restrictions on the right to sue. Thus, even if the invasions of petitioners' rights occurred in 1953 or 1954, the cause of action was not barred here since suit could only be brought after the guardian's discharge in 1961, and the limitations on the right to sue could not expire until a year after the discharge. And the holding below that the limitations periods of § 95.11 began to run in 1953 or 1954, many years prior to the 1961 discharge, is in direct conflict with the *Beck* decisions.[17]

(2) The conflict between the decision below and the Florida law as to the applicability of the general limitations periods of § 95.11 to a suit of this nature is further highlighted by the principles enunciated by the Florida Supreme Court in *Bloxham* v. *Crane,* 19 Fla. 163, 172; and *Fisher* v. *Guidy,* 142 So. 818 (Fla.).

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[17] If there be any merit to the lower court's theory that the first limitations statute to run bars the suit in question it would apply here only as to causes of actions accruing, under the *Beck* decisions, after the final discharge of the guardian—in which event the special one-year period provided by § 746.14 would elapse before the longer general periods of § 95.11.

The Florida court there ruled that the limitations provisions now codified in § 95 are not available to a guardian in defense against a claim by his ward during the term of a guardianship or trust. "So long as the trust relation existed," said the court in *Fisher,* 142 So. at 820, "the statute of limitations did not begin to run, nor can the doctrine of laches be applied, for the reason that the possession of the trust funds is not adverse to the equitable title of the ward, but consistent with it."

In short, § 95.11's limitations periods are not designed to apply or to start running in favor of the guardian during the term of the guardianship. Thus the ruling below that § 95.11's periods began to run in this case in 1953 or 1954—long before the guardianship terminated in 1961—is in direct conflict with the *Bloxham* and *Fisher* rulings of the Florida court.[18]

(3) Wholly aside from the question of the controlling effect of the special rather than the general limitations statute, the Court of Appeals' failure to recognize that a statute of limitations does not in any event bar a collateral attack on a void judgment—i.e., the guardianship order which was completely lacking any statutory or jurisdictional basis—is so contrary to established law in this Court and in Florida as to call for corrective action forthwith.

Florida law is plain that a void order or judgment may be attacked and set aside at any time in an appropriate proceeding on the theory that the court involved had no jurisdiction to enter it. See, e.g., *Kroier*

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[18] See also this Court's opinion in *Order of St. Benedict* v. *Steinhauser,* 234 U.S. 640, 652, holding that a general Minnesota limitations statute could not begin to run during the term of a trust so as to bar a claim against the trustee.

v. *Kroier,* 116 So. 753, 757 (Fla.); *Einstein* v. *Davidson,* 17 So. 563 (Fla.); *Johnson* v. *McKinnon,* 45 So. 23 (Fla.). The decisions of this Court are equally clear on this point. See *Thompson* v. *Whitman,* 18 Wall. 457; *Pennoyer* v. *Neff,* 95 U.S. 714; *Windsor* v. *McVeigh,* 93 U.S. 274; *McDonald* v. *Mabee,* 243 U.S. 90.

A substantial part of the instant suit involves the voidness of the Florida judge's order appointing the respondent bank as guardian, an order which he was without jurisdiction to enter in the absence of an authenticated adjudication of the ward's mental incompetence.[19] The Court of Appeals' holding that the limitations periods of § 95.11 bar the assertion of such a claim is thus directly contrary to established Florida law, as well as the decisions of this Court, permitting this type of collateral attack at any time.

(4) Under Florida law the running of any statute of limitations is tolled as to fraudulent concealment and withholding of a ward's assets by a guardian until the fraud is actually discovered. See *Dacus* v. *Blackwell,* 90 So. 2d 324, 327 (Fla.); *McCrory Stores Corp.* v. *Lee,* 25 So. 2d 567, 568 (Fla.). But where the facts involving the fraud and the excuses for the delay in discovering that fraud are in dispute, Florida law requires that such issues be determined by a jury. *Metcalf* v. *Johnson,* 113 So. 2d 864, 868 (Fla. App.).[20]

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[19] None of the courts below, federal or state, have passed upon or denied petitioners' claim that the appointment order was in fact void, although the Florida Supreme Court (see p. 27a, *infra*) conceded that there is "some merit" to petitioners' arguments.

[20] The *Metcalf* opinion, quoting from a Georgia case, stated that "where there are facts involving fraud and excuses for delay in discovering the same, the question is one of mixed law and fact, and is a question for determination by the jury under proper instructions from the court." 113 So. 2d at 868.

The Court of Appeals below, however, proceeded to affirm the summary denial of the motion that sought to produce newly discovered evidence of fraud. And it further ruled, without the benefit of any jury determination of the disputed facts, that the alleged fraud had in fact been discovered by the petitioners as early as 1953 and hence was barred by the three-year fraud limitations period of § 95.11. See Appendix A, p. 7a, *infra.* In so ruling, the court below has effectively deprived the petitioners of their right to a jury determination of these fraud issues, a right guaranteed by Florida law. The denial of that right is compounded here by the decisive impact of that denial upon the running of the limitations period.

In these circumstances, the question posed as to the conflict between the decision below and applicable Florida law becomes of such public importance as to warrant the grant of certiorari. This Court has consistently unscored the vital importance of preserving the right to a jury trial in all of its manifold aspects and certiorari has frequently been granted to assure such preservation. See, e.g., *Beacon Theatres* v. *Westover,* 359 U.S. 500, 501 (certiorari granted because "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."); *Wilkerson* v. *McCarthy,* 336 U.S. 53, 55; *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500, 501. And review is further justified in order to make sure that those who suffer the charges and the realities of mental illness are not discriminated against

in their right to a jury trial and determination of such issues as limitations.[21]

3. THE COURT BELOW, IN RULING THAT NO FEDERAL QUESTION WAS PRESENTED IN THIS SUIT AGAINST A GUARDIAN APPOINTED BY A STATE COURT, HAS DECIDED AN IMPORTANT ISSUE IN CONFLICT WITH DECISIONS OF THIS COURT.

The Court of Appeals below asserted (see pp. 7a-8a, *infra*) that petitioners' claim that the petitioner wife had been deprived of the possession of her property without due process of law as required by the Fourteenth Amendment stated no federal cause of action against the respondent guardian bank. On the assumption that the bank as guardian was merely a private party, the court concluded that the Fourteenth Amendment bars only state action, not individual misconduct. In so ruling, the court below is in such conflict with decisions of this Court as to make the grant of certiorari most compelling.

There can be no quarrel, of course, with the proposition that the Fourteenth Amendment's proscriptions deal exclusively with state rather than private action. *Civil Rights Cases,* 109 U.S. 3; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715. But it is also true that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley* v. *Kraemer,* 334 U.S. 1, 14; and see *Virginia* v. *Rives,* 100 U.S. 313, 318. And it has further been established by this Court that a guardian or administrator "appointed by a state court is an

[21] See *Gulf, Colorado & Santa Fe R. Co.* v. *McClelland,* 355 F. 2d 196 (C.A. 5), where the same court that decided the instant case emphasized the necessity of a jury trial on a limitation issue in a suit for damages by an injured railroad employee.

officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court . . ." *Byers* v. *McAuley,* 149 U.S. 608, 615.[22]

It would therefore follow that the taking of property by a court-appointed guardian is state action for purposes of the Fourteenth Amendment. That conclusion is reinforced by this Court's ruling in *Chaloner* v. *Sherman,* 242 U.S. 455, a decision which must be considered to be in direct conflict with the ruling below.

Like the instant case, the *Chaloner* case was premised both on diversity of citizenship and on a federal question, and was an action for damages against a guardian appointed by a state court. And like the instant case, the *Chaloner* suit alleged that the state court orders appointing the guardian were void and that the guardian's custody of the ward's property had been in violation of federal due process of law.[23] This Court's statement, 242 U.S. at 457, that it had "jurisdiction to review the whole case"—including the claim that the actions of the court-appointed guardian had violated the plaintiff's rights under the Fourteenth Amendment—reflects a studied acknowledgement that

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[22] To the same effect that guardians appointed by a state court to control property of a ward are officers of that court, see *Redditt* v. *Hale,* 184 F. 2d 443, 446 (C.A. 8); *Martineau* v. *City of St. Paul,* 172 F. 2d 777, 780 (C.A. 8).

[23] There are other factual parallels between the instant case and the *Chaloner* case. For example, the *Chaloner* suit alleged, as does the instant one, that the ward had been "corruptly lured" from his home and illegally committed to a mental institution. 242 U.S. at 461. But the plaintiff in *Chaloner* was given the chance to prove his charges; the petitioners herein have been denied that opportunity.

a federal claim had indeed been asserted and should be resolved on its merits.[24]

The refusal of the court below to acknowledge the existence of a like claim in this case constitutes, therefore, a direct conflict with the *Chaloner* decision. And the inherent importance of this state action issue, in the light of this conflict, warrants the grant of certiorari.

Proper pleading of a federal cause of action, premised upon such state action and alleging a violation of federal rights, justifies the opportunity to prove one's case on the merits, an opportunity denied these petitioners. See *Conley* v. *Gibson,* 355 U.S. 41, 48; *Foman* v. *Davis,* 371 U.S. 178, 182. Had petitioners been given that chance, they might well have proved an arbitrary intrusion upon their rights of privacy and upon the right to use and enjoy private property as guaranteed by the Fourteenth Amendment. See *York* v. *Story,* 324 F. 2d 450 (C.A. 9), certiorari denied, 376 U.S. 939, holding that a plaintiff stated a cause of action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, in alleging that police officers had arbitrarily intruded upon her privacy in violation of federal due process. And see *Monroe* v. *Pape,* 365 U.S. 167.

CONCLUSION

It need only be added, in conclusion, that the alternative theory advanced by the District Court below in dismissing petitioners' claims, the res judicata theory, affords no basis whatever for sustaining the judgment of the Court of Appeals or for immunizing it from

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[24] The Court in the *Chaloner* case, only because of a record fully developed in a jury trial, was able to conclude on the merits that the plaintiff there had not been denied federal due process of law since there had been proper compliance with the applicable state laws. But in the instant case the failure to comply with state law in appointing the guardian is most blatant and undeniable.

review. The parties, the issues and the determinations in the prior state court proceedings were so entirely different from those here involved as to make res judicata inapposite.[25]

For the various reasons set forth in this petition, certiorari should be granted to review the judgment below. The questions raised herein are of significance not only to these petitioners but to the maintenance of the obligation of federal courts to respect applicable state law. And even more importantly, the issues are critical to the legal well-being of all those incarcerated from time to time for mental illness. It is they who deserve the fullest consideration of this Court in this case, to the end that they can be assured that there will be no legal discrimination against the assertion of their civil and constitutional rights.

Respectfully submitted,

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May 9, 1966.

[25] The Court of Appeals, of course, expressly eschewed reliance on the res judicata doctrine. It did so wisely, for the prior state court proceedings involved only the protests of the ward, the petitioner wife, against certain fees and accounts of the guardian and its counsel. The state courts carefully refrained from passing upon the validity or voidness of the appointment order, as the court below noted; and any event res judicata is inapplicable with respect to a judgment entered without jurisdiction and hence void in nature. *Florida National Bank* v. *Kassewitz*, 156 Fla. 761, 25 So. 2d 271. And the petitioner husband was in no sense a party to those prior proceedings. Not until the instant suit was instituted by both petitioners did the contentions of conspiracy, collusion and fraud come into existence or become ripe for judicial resolution.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21088

VIRGINIA WILLYS LUCOM and WILSON C. LUCOM,
Appellants,

v.

ATLANTIC NATIONAL BANK OF WEST PALM BEACH, FLORIDA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(December 10, 1965.)

Before JONES, WISDOM and GEWIN, Circuit Judges.

JONES, Circuit Judge: In 1953 the appellant,[1] then a Florida resident, was adjudicated incompetent and restored a few months later. The appellee bank was the guardian of her property during her incompetency. Shortly after her restoration, she re-entered a mental hospital in Philadelphia. It appears her children induced her to Philadelphia without revealing the purpose of the trip. The children then brought a habeas corpus proceeding in a Pennsylvania state court to establish the legality of her confinement, and she was declared "mentally ill" within the meaning of the

[1] Virginia Willys DeLanda. She has since married Wilson C. Lucom, who joins her in this action.

Pennsylvania Mental Health Act of 1951.[2] An adjudication of "incompetency" would necessarily have been under a different statute.[3] A Florida county court reappointed appellee bank as guardian of appellant's property on the basis of the Pennsylvania judgment. Appellant was restored in New York in 1954. She is now a resident of New York.

Appellant did not appeal the appointment of a guardian but attacked collaterally by contesting the accounting in 1954 and 1955 on the basis that the guardianship was invalid for lack of compliance with Florida law. The contest reached the Supreme Court of Florida as *Lucom* v. *Atlantic Nat'l Bank*, Fla. 1957, 97 So. 2d 478, which held the bank and its attorneys entitled to compensation whether or not the guardianship was valid. The court expressly omitted ruling on the validity of the appointment, holding that the bank was at least a guardian de facto and, as such, was entitled to be paid.[4] The accounting was approved and discharge ordered in 1955 but final discharge was delayed by litigation until October 11, 1961.

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[2] "Mental illness" shall mean an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him as to be under care. The term shall include "insanity," "unsoundness of mind," "lunacy," "mental disease," "mental disorder," and all other types of mental cases, but the term shall not include "mental defectiveness," "epilepsy," "inebriety," or "senility." Pa. P.L. 141, June 12, 1951 § 102(11).

[3] "Incompetent" means a person, who, because of mental infirmities of old age, mental illness, mental deficiency, drug addiction or inebriety, is unable to manage his property, or is liable to dissipate it or become the victim of designing persons. It includes a person heretofore declared to be a lunatic, an habitual drunkard, insane or weak-minded. Pa. P.L. 158, June 28, 1951, § 102(3).

[4] The same cause reached the Florida Supreme Court again as Lucom v. Potter, Fla. 1961, 131 So. 2d 724, which settled a controversy as to the amount of attorney's fees.

This case was brought in Federal district court on October 8, 1962, for damages resulting from a taking of property without due process of law by way of the alleged invalid guardianship, alleged disloyal and negligent actions of the guardian, the withholding of appellant's papers, and fraud and conspiracy to accomplish all this. Jurisdiction was grounded on diversity and a claimed Federal question under the Fourteenth Amendment. Summary judgment was entered for the bank on the grounds that the action was barred by limitations and that the Florida adjudications were res judicata or that they collaterally estopped the appellant on all questions except the count for production of papers. The count for production was later dismissed for failure to comply with orders to specify the documents desired. Four appeals are consolidated here: from the summary judgment; from denial of relief from the summary judgment under Rule 60(b) of the Federal Rules of Civil Procedure on the ground of newly discovered evidence; from the dismissal of the count for production; and from denial of disqualification of one of the bank's attorneys on a claim of conflict of interest.

Florida has two limitation statutes which might be relevant to this matter: Fla. Stat. Ann. § 95.11, which provides a general four-year period and a three-year period for actions for fraud;[5] and Fla. Stat. Ann. § 746,

[5] Actions other than those for the recovery of real property can only be commenced as follows:

(4) Within four years.—Any action for relief not specifically provided for in this chapter.

(5) Within three years.—

(d) An action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Fla. Stat. Ann. § 95.11

which provides that no action may be brought against a guardian more than a year after discharge.[6] Appellant argues that Section 746.14, alone, applies and that, as suit was instituted within a year of final discharge, the action may be maintained. We find the Florida law to be to the contrary.

Insofar as the briefs and our research have disclosed, only one Florida case has considered the interaction of these particular statutes. That case, *Beck* v. *Barnett Nat'l Bank*, Fla. 142 So. 2d 329, held that an action commenced more than a year after discharge was barred by Section 746.14 notwithstanding that the period provided by Section 95.11 had not run since the acts complained of. Neither this holding nor any language in the opinion implies that Section 95.11 cannot bar an action instituted within a year of discharge. On the contrary, Florida cases hold that when two statutes limit the time in which an action may be brought, both apply and the dilatory litigant in caught by whichever runs first.

In *Palmquist* v. *Johnson*, Fla. 1949, 41 So. 2d 313, the Florida Supreme Court held that the owner of the record title to real property under a tax deed was precluded from maintaining a suit for possession by a provision requiring such suit to be brought within four years[7] despite the general statute,[8] amended subsequent to the tax deed statute

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[6] Upon the consideration of the application for discharge and of the objections thereto, if any, and of the evidence, if the county judge is satisfied that the guardian has faithfully and completely discharged his duties and has rendered complete and accurate final returns and has delivered the assets of the ward to the person entitled thereto, the county judge shall enter an order of discharge. Such discharge shall operate as a release from the duties of the guardianship and as a bar to any suit against said guardian or his surety, unless such suit is commenced within one year from the date of the discharge. Fla. Stat. Ann. § 746.14.

[7] Fla. Stat. Ann. § 196.06.

[8] Fla. Stat. Ann. § 95.16.

and so considered as more recent, which would have allowed the suit. It does not appear that the decision turned on one section being a "special" statute and the other being "general," as the appellant contends here, but rather upon duty of the court to harmonize apparently conflicting statutes.

Similarly, the Florida court, in *State* v. *Haddock,* Fla., 149 So. 2d 552, considered a statute allowing the probate of a will to be revoked "at any time before discharge"[9] and one requiring petitions for revocation to be filed within six months after a notice required by statute.[10] No irreconcilable conflict was found. As the notice had been given and over six months had elapsed, the suit was barred even though the other section would have allowed it.

Of the cases which have come to our attention, the one most nearly in point is *Perry* v. *Reichert,* 113 Fla. 125, 151 So. 403. Suit was brought against an administrator to recover on an account the decedent had owed for just under four years at death. The general, three year statute[11] had run but a special statute[12] stating that debts due from decedents on accounts owing for more than five years at death would be expunged, was argued to be controlling. The court found that the special statute was not intended to allow suits otherwise barred. The same rationale is applicable here to the appellant's argument.

Having determined that either statute might bar the appellant's action, we turn now to the question of the time

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[9] Fla. Stat. Ann. § 732.30.

[10] Fla. Stat. Ann. § 732.28.

[11] Fla. Comp. Gen. Laws § 4663(5)(5) (1927), now Fla. Stat. Ann. § 95.11(5)(e).

[12] Fla. Comp. Gen. Laws § 5620 (1927).

from which the period began to run under Section 95.11.[13] The appellant contends that the statute does not begin to run until she has accrued a "complete cause of action." If the adjective "complete" is intended to add anything to the meaning of the phrase "cause of action", the law of Florida is otherwise.

In Florida, a cause of action accrues and the statutory limitation period commences when the invasion of a right occurs,[14] if there is notice of the invasion,[15] even though the damages may not materialize until later.[16] The only exceptions appear to be where there is no one to sue so that no action may be brought[17] and where the party at fault fraudulently conceals the invasion of right.[18] The invasions of the appellant's rights, if invasions there were, took place in 1953 when the guardianship was obtained and should have been known to the appellant at that time. In any event, the invasions were known in 1954 when the appellant attacked the accounting of the bank. It is not

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[13] We do not mean to imply that the time has necessarily not run under § 746.14. As noted by the trial judge, "substantial reasons can be advanced for holding that the one year statute started running no later than the compliance by the defendant with the provisional order on discharge by the County Judge." See Davis v. Combination Awning & Shutter Co., Fla., 62 S. 2d 742.

[14] Cristiani v. City of Sarasota, Fla. 1953, 65 So. 2d 878.

[15] City of Miami v. Brooks, Fla. 1954, 70 So. 2d 306.

[16] Cristiani v. City of Sarasota, supra.

[17] Berger v. Jackson, Fla. 1945, 23 So. 2d 265. That all the elements necessary for a successful suit may not be available is insufficient to prevent the statute from running. Seaboard Air Line R.R. v. Ford, supra.

[18] Metcalf v. Johnson, Fla., 113 So. 2d 864. It is the invasion itself which must be concealed, not merely the extent of the invasion or the injury. Compare Buck v. Mouradian, Fla., 100 So. 2d 70, cert. den., 104 So. 2d 592, with Proctor v. Schomberg, Fla., 63 So. 2d 68.

clear that the statute has been tolled at all in this case[19] but any tolling which may have occurred ceased in 1954 when the appellant was adjudicated competent in New York. The four year statute has long since run on those counts to which it is applicable.

Appellant alleges fraud, to which a three year limitation period running from the discovery of the facts constituting the fraud applies. Proof of fraud or fraud as a defense requires a showing of certain elements, without which there is no cause of action.[20] It is doubtful whether these elements have been alleged or proven in this case. In any event, the fraud alleged was incident to the procurement of the guardianship, which was in 1953. While it does not appear that fraud per se was alleged in the collateral attack on the guardianship, virtually all the facts relied upon here as constituting the fraud were asserted in that proceeding. As the facts constituting the fraud were stated, it cannot be said that they had not been discovered. If there was fraud, it has long been barred by the three year statute.

Appellant alleges that she has been deprived of the possession of her property without due process of law as required by the Fifth and Fourteenth Amendments. If this is an attempt to state a Federal cause of action, it is in vain. It is well settled that the Fourteenth Amendment is a bar to state action, not individual misconduct. Any reliance on the Civil Rights Act[21] is equally futile as the

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[19] See Fla. Stat. Ann. § 95.05; Faulk & Coleman v. Harper, Fla., 62 So. 2d 62.

[20] See generally, Prosser, Torts, 3d Ed. § 100.

[21] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C.A. § 1983.

actions complained of must be done under color of law. *Dinwiddie* v. *Brown,* 5th Cir. 1956, 230 F. 2d 465, cert. den. 351 U.S. 971, 76 S. Ct. 1041, 100 L. Ed. 1490, reh. den., 352 U.S. 861, 77 S. Ct. 29, 1 L. Ed. 2d 72, settles this point. There the "allegation of the obtaining of a fraudulent judgment by private individuals," 230 F. 2d at 469, was held to state no cause of action under the Constitution or the Civil Rights Acts.

Since there was no cause of action stated which was not barred by limitation, the summary judgment below was correct.[22]

The newly discovered evidence which formed the basis for the motion for relief from the summary judgment under Rule 60(b) is largely cumulative and relates to the same causes of action we find to be barred by limitations. There is no evidence of fraudulent acts such as would prevent the limitation statute for fraud from running as the acts, themselves, have long been known even if it is assumed that the precise part played by each actor was recently discovered. We find no abuse of discretion calling for reversal.

The count for production of documents was dismissed for failure to specify the documents desired after repeated opportunities to do so. Such action is in the sound discretion of the trial judge, and this discretion was not abused.

Appellant contends that one of the attorneys for the bank acted improperly in defending this action and should have been disqualified for a conflict in interest. There is no merit in this contention. *Marco* v. *Dulles,* S.D. N.Y. 1959, 169 F. Supp. 622, appeal dis., 268 F. 2d 192.

The judgments of the trial court are hereby

AFFIRMED.

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[22] It is unnecessary to decide whether the action is also barred by the prior litigation in the state courts.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellants, Virginia Willys Lucom and Wilson C. Lucom, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 10, 1965

Issued as Mandate: January 4, 1966

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Opinion on Motion for Summary Judgment

Filed August 8, 1963

(Title Omitted)

This matter is presently before the Court on the defendant's motion for summary judgment. After hearing argument, examining the exhibits, and considering the various briefs filed herein, the Court is of the following opinion.

STATEMENT OF FACTS

There is no material disagreement between the parties as to the factual background necessary to consideration

of the defendant's motion for summary judgment. The questions presented by that motion are principally whether this action is barred by res judicata including estoppel by judgment and/or the statute of limitations. Both of these questions are legal rather than factual in nature on the state of this record.

The suit arises out of a former incompetency guardianship in the County Judge's Court of Palm Beach County, Florida. The estate involved property in the value of some $1,900,000. The former ward and her husband, both currently citizens of New York, seek $1,205,000 compensatory and $1,000,000 punitive damages against the former guardian bank.[1] The defendant entered upon its guardianship of the property of the plaintiff by order of October 7, 1953. Active guardianship was terminated by order of May 25, 1955 wherein the guardian's final accounting was approved and discharge was directed upon turnover, against receipt, of all property which was accomplished within a few days following this order.[2] The plaintiff-ward took two appeals to the Supreme Court of Florida from these orders of the County Judge's Court. The first of these appeals is of particular significance in determination of this cause.[3] The table in footnote below presents

[1] It is interesting to note that despite the substantial ad damnum that no actual allegations as to diminution of the estate during the guardianship are made except certain allegations of negligent failure to collect promissory notes and other administrative negligence trivial in comparison to the total damages sought, and the plaintiff also seeks to recover extensive administration and litigation expense incurred.

[2] Other than a statutory Court cost reserve of $45.15 since paid out, and unspecified papers which plaintiffs allege and defendant admits it still holds notwithstanding the receipt, but which defendant offers to turn over against payment for making copies.

[3] Lucom v. Atlantic National Bank, 97 So. 2d 478 (Fla. Sup. 1957). The second appeal was Lucom v. Potter, 131 So. 2d 724 (Fla. Sup. 1961).

a capsuled history of the events prior to the instant litigation.[4]

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[4] Dec. 1952—Plaintiff was first adjudged incompetent by County Judge of Palm Beach County.

May 1953—Plaintiff judicially restored to competency by Circuit Court of Palm Beach County.

July 1953—Plaintiff re-entered Pennsylvania hospital for mental sickness.

Sept. 1953—Plaintiff found "mentally ill" in habeas corpus proceeding in Pennsylvania Court.

Oct. 1953—County Judge of Palm Beach County re-appointed defendant as guardian after hearing (where plaintiff was represented by guardian ad litem) on strength of the Pennsylvania proceeding.

Dec. 1953—Plaintiff released from Pennsylvania hospital and returned to her home in Palm Beach.

Spring, 1954—Plaintiff started and abandoned restoration proceedings in Palm Beach County.

Spring, 1954—Plaintiff married co-plaintiff Wilson C. Lucom and moved to New York.

Summer, 1954—Plaintiff started restoration proceedings in New York.

Oct. 1954—New York restoration proceedings terminated in plaintiff's favor.

Dec. 1954 & Jan. 1955—Plaintiff filed objections to periodic accounting of defendant.

May 1955—Defendant filed final accounting.

May 1955—County Judge of Palm Beach County entered order approving accountings, awarding fees, overruling objections and ordering discharge.

May 1955—Plaintiff acknowledged receipt of her property from defendant.

May 1955—Plaintiff gave notice of appeal from County Judge's order.

Feb. 1956—Circuit Court affirmed County Judge.

March 1956—Plaintiff gave notice of appeal from Circuit Court.

July 1957—Florida Supreme Court affirmed except as to certain attorneys' fees and disbursements.

April 1960—Circuit Court awarded attorneys' fees after trial on remand.

May 1960—Circuit Court decision appealed by plaintiff.

June 1961—Florida Supreme Court affirmed Circuit Court.

Oct. 11, 1961—Final discharge.

Oct. 8, 1962—This suit instituted.

In order to consider the defense of prior adjudication, it is necessary to examine the allegations of the complaint as amended.

Count I of the Complaint

Jurisdiction of the Court is invoked on both diversity of citizenship and as "arising under" the 14th Amendment. The first count in some ten pages of pleading may be summarized by indicating that the plaintiffs claims damages for the unlawful taking of her property without due process or equal protection of the laws under the 14th Amendment to the Constitution on the basis that the defendant either procured the guardianship proceeding and appointment thereto or in the alternative subsequently adopted the proceeding, and that the proceeding was void, illegally procured and/or acted upon in fraud of the plaintiff's rights. The entire count in essence is a collateral attack on the decision of the Supreme Court of Florida in Lucom v. Atlantic National Bank, 97 So. 2d 478 (Fla. Sup. 1957) grounded on the theory that the Florida proceedings were void for lack of procedural due process in that the proceedings did not conform to the Florida statutory requisites.

Count II of the Complaint

A summary of the pleading in Count II needs somewhat more detailed analysis since it combines several matters. Paragraph 1 realleges the allegations of Count I, Paragraphs 2, 3, 4 and 8 seek damages for adverse and disloyal actions of the defendant in the abandoned restoration proceedings in Palm Beach County in the Spring of 1954 and in the restoration proceedings in October, 1954 in New York. Paragraphs 5, 6 and 9 complain of negligent failure to collect two promissory notes and negligent failure to secure the return of the plaintiff's personal check which allegedly should have been returned to the plaintiff under an executory agreement with the payee thereof. Paragraph

10 is a shotgun allegation of wrongful disbursement of sums belonging to the estate and actually is again a collateral attack on the accounting approved by the Florida Courts. Paragraphs 11 and 12 attack the guardian's loyalty in regard to the payment to and conduct of the previously appointed guardian of a minor daughter of the plaintiff, and paragraph 11 also charges a libel on co-plaintiff husband, Wilson C. Lucom. Paragraph 7 charges that the bank is holding certain unspecified papers of the plaintiff.

Count III of the Complaint

Count III restates the allegations of Count I, and of paragraphs 2, 3, and 4 of Count II as a conspiracy between the bank and its attorneys, the plaintiff's personal attorney, the plaintiff's two adult children, and the plaintiff's doctor.

Lucom v. Atlantic National Bank in the State Courts

The ward unsuccessfully objected to the approval of defendant's accounting before the County Judge, and in her assignments of error before the Circuit Court of Palm Beach County on appeal she excepted to the defendant's accounting, complained that the Pennsylvania Court's finding that she was "mentally ill" was not a finding of incompetency, and that the appointment of a guardian was therefore without due process of law and without jurisdiction. She also attacked the Pennsylvania proceeding as fraudulent and beyond that Court's jurisdiction, attacked the bank's attorneys' compensation for representing adverse interests, and attacked all allowances of compensation. The Circuit Court overruled all exceptions and affirmed.

The ward again appealed and in her assignments of error before the Supreme Court of Florida renewed all of these objections with particularity as to the jurisdictional

and procedural base for the appointment of the guardian, and specifically raised the due process question under the 14th Amendment of the United States Constitution.

A comparison of plaintiff's assignments of error on appeal in the state Courts with the more prolix pleading in Count I of the present complaint establishes that in substance they are identical. In addition, the assignments of error as to attorneys' fees make it clear that the question of loyalty in paragraphs 2, 3, 4, 8, 11 and 12 was raised in the prior proceedings as well as the question of the propriety of the accounting which is questioned generally in paragraph 10 of the present complaint.

Thus, it can be seen that by the assignments of error the state Courts had before them all of the allegations of the present complaint except those allegations of negligent action contained in paragraphs 5, 6 and 9 of Count II and of failure to return papers in paragraph 7 of Count II. As will be seen below an essential element of Count III was also before the state Courts.

Opinion

Defense of Res Judicata

The decision of the Supreme Court of Florida at 97 So. 2d 478 in the face of these contentions decided three things which are salient to our consideration of the matter. First, the bank ". . . accepted the guardianship in good faith, and has executed the trust to the best of its ability . . . (T)he bank . . . is entitled to an equitable credit for expenditures which were made in good faith for the ward.", and ". . . is entitled to compensation for its services rendered in good faith . . ." Second, the Court while not reaching an absolute decision on plaintiff's contention that the Pennsylvania adjudication of "mentally ill" was insufficient to ground Florida incompetency proceedings because mental illness is not necessarily tantamount to incompetency said, "But this question need not

be decided . . . Even if not a guardian de jure, the bank was a guardian de facto." In other words the Court found a valid guardianship whether in exact conformity to the Florida statutes or not. Finally, the Court indicates that it has considered all of the points raised by the plaintiff here and rejected them, i. e., "The other questions presented here by the appellant have been considered and no reversible error has been found."

This Court need not approve or disapprove the decision of the Supreme Court of Florida. That Court necessarily decided that the proceedings below were not absolutely void.[5] It rejected the plaintiff's contention of denial of due process made at every level of the proceeding, and it approved the good faith of the guardian bank in entering upon and acting upon the guardianship, its accounting, and its proper discharge.

The decision of the Supreme Court of Florida is res judicata between these parties in so far as it (1) rejected the argument that the guardianship proceedings were absolutely void and a nullity and in fact held that they were valid as a guardianship de facto which proceeding the Court expressly sanctioned and recognized as subsisting under Florida law, and (2) denied the contention of the plaintiff that the proceedings were void for lack of due process under the federal constitution.

The plaintiff has urged, since the state Court opinion has no express mention of the constitutional ground, that

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[5] In so determining the Court is aware of the contention of the plaintiff that the state decision has been uniformly interpreted by legal scholars to be a determination that the judgment appointing the guardian was void and a nullity. The scholarly reference is to 14 U. Miami L. Rev. 225 (1959) and 44 C.J.S. pocket part for 217 n. 15. The Court suggests that the very result in the state Court proceedings puts these "scholars" in the situation of proclaiming a logical and semantic absurdity. Their error probably stems from the confusion ever inherent in the problem of void as opposed to voidable proceedings.

therefore as to that matter the judgment is not res judicata. However, the Supreme Court of the United States has expressly rejected such argument where, as here, the question of the constitutional validity of the proceeding was distinctly presented by the appellant to and necessarily was resolved against her by the judgment of the state appellate Court. Grubb v. Public Utilities Comm., 281 U.S. 470, 477 (1930).

Nor does the plaintiff's further contention that the causes of action involved in the present case lack "identity" with the cause of action asserted by the plaintiff in objections to the accounting in the state Courts furnish any greater comfort. The identity of the facts presented to the state Court and the facts pleaded in this action is apparent on their face. Apparently, the plaintiff confuses "cause of action" with relief sought. This is not the law in this circuit or in this state. As was said by one of the great judges of our circuit:

"What is important and determinative now, as to the identity of cause of action, is not identity of form, but of grounds."

Wilson Cypress Co. v. Atlantic Coast Line R. Co., 109 F. 2d 623, 637 (5th Cir. 1940).

The Courts of Florida have consistently held that

". . . identity of causes of action . . . means an identity of the facts essential to the maintenance of the action."

City of Miami Beach v. Prevatt, 97 So. 2d 473, 477 (Fla. Sup. 1957). See also Gordon v. Gordon, 59 So. 2d 40, 44 (Fla. Sup. 1952); Murphy v. Murphy, 10 So. 2d 136, 137 (Fla. Sup. 1942).

We conclude that there is identity of issues in so far as the plaintiff's complaint rests upon the denial of due process and the void as opposed to viodable nature of the state Court proceedings. As demonstrated above the fact

that relief sought differs from that sought in the state Court is of no consequence. Angel v. Bullington, 330 U.S. 183 (1946), is determinative of the case in so far as jurisdiction and due process are concerned. The plaintiff failed to appeal from the adverse decision of the state Supreme Court to the United States Supreme Court and having accepted the verdict of that Court (even though it might be erroneous) cannot relitigate the same issues in a Federal District Court.

"The 'merits' of a claim are disposed of when it is refused enforcement. If an asserted federal claim is denied enforcement on a professed local ground, but a so-called local ground which is subject to review here because it is in fact the adjudication of a federal question, then the 'merits' of that claim were adjudicated in the only sense that adjudication of the 'merits' is relevant to the principals of res judicata. A State Court cannot sterilize federal claims by putting on the adjudication of local label." 330 U.S. at 190-91.

Nor is the fact that the County Judge's Court is a Court of limited jurisdiction of any comfort to the plaintiffs. It is none the less a Court with authority to determine whether or not it has jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which it is called to act.[6] Its determination of such

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[6] F.S.A. 744.06(1)(a) "The county judge shall have jurisdiction over all matters pertaining to guardian and ward. . . ."

F.S.A. 744.06(1)(b) "The county judge may hear and determine complaints of wards against their guardian. . . ." See United States v. Silliman, 167 F. 2d 607 (3rd Cir. 1948), cert. denied, 335 U.S. 825 (1948) which involved issues very analogous to those sub judice where the original litigation was in the New York Surrogate's Court and the subsequent litigation occurred in the Federal District Court of New Jersey. See also Geracy, Inc. v. Hoover, 133 F. 2d 25 (D.C. Cir. 1942) where defensive matter asserted in Municipal Court precluded subsequent assertion of same claim in District Court and in an amount which would have been in excess of Municipal Court jurisdiction.

questions while open to direct review, may not be assailed collaterally. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 376 (1940).

Plaintiff seeks to apply the doctrine that a void judgment is open to collateral attack at any time. But this doctrine is itself subject to the limitation that there can be only one attack on even a void judgment, for an unsuccessful or abandoned attack becomes itself an adverse adjudication. When plaintiff, after her alleged mistreatment by the County Judge's Court, chose not to make a collateral attack by coming then to this Court, but instead initiated review through the state Court system, she became bound by her choice of remedy. As in Angel v. Bullington, supra, her failure to seek United States Supreme Court review of the adverse decision of the Florida Supreme Court bars her from United States District Court. American Surety Co. v. Baldwin, 287 U.S. 156, 164-66 (1932); Warriner v. Fink, 307 F. 2d 933 (5th Cir. 1962).

As already noted Plaintiff's Count I allegations of procedural irregularity, as distinguished from her allegations there of fraud, all involve the assertion that the Pennsylvania finding of "mentally ill" was an insufficient predicate for a Florida proceeding turning on "incompetency." That contention must fail for still another reason of Florida law, quite apart from prior adverse Florida adjudication. The Florida Guardianship Law provides in the case of a "non-resident"—a term which, as construed in In re Cameron's Estate, 158 Fla. 91, 28 So. 2d 110 (Fla. Sup. 1948), includes plaintiff as a permanent Florida resident temporarily in Pennsylvania under hospital treatment—that an adjudication of "unsoundness

of mind" in the state of hospitalization is "prima facie proof of such incompetency."[7]

Although plaintiff offers here her own affidavit that she was at all material times competent, she does not show here that she tendered any proof of competency in the Florida proceedings. Were the issue of actual competency now open to her, her affidavit proof might raise a question of fact precluding summary judgment, notwithstanding the record of the Pennsylvania proceedings, which is part both of the Florida proceedings and this proceeding here. The Pennsylvania record includes the testimony of her attending psychiatrist to the effect that while hospitalized she was suffering from paranoid delusions[8] and she had difficulty in knowing what property she had and what was being done with it. But the quoted statute, because it turns the Pennsylvania adjudication of "mental illness" into "prima facie proof" of "incompetency," closes that issue

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[7] F.S.A. 744.19 "Petition for appointment of resident guardian for the property of non-resident incompetent . . . (2) if it is alleged that the incompetency is due to mental or physical incapacity, the petition shall be accompanied by a duly certified or exemplified copy of the adjudication of unsoundness of mind or of physical incapacity from the qualified authorities in the state, territory or country where such incompetent is domiciled, and shall state whether said incompetent is in the custody of any person or institution, and if so, shall give the name and address of the custodian. Such adjudication shall constitute prima facie proof of such incompetency."

[8] The record of the Pennsylvania proceeding indicates that at the time of that hearing the physicians in charge of the plaintiff had seen fit to give her a matter of 14 insulin shock treatments for what the testimony indicated was a schizophrenic paranoia.

to her here if only because she did not show here that she rebutted that "prima facie proof" in Florida.[9]

Not only the issues of jurisdiction and due process, but an essential element of the issues of fraud, disloyalty, and conspiracy has been litigated between these parties and has been decided adversely to the plaintiff. The Florida Supreme Court's finding of good faith acceptance and execution of the trust negates the commission of any tortious acts toward the plaintiff which require intent as an essential element. The Court concludes that the plaintiff cannot re-litigate in this Court paragraphs 1, 2, 3, 4, 8, 11, and 12 of Count II. Likewise Count III, the conspiracy count, suffers from the same infirmity. Paragraph 10 of Count II is barred since this was obviously the subject matter of the accounting litigation between the parties.

Paragraphs 5, 6, and 9 of Count II involve negligent administration of the trust. These allegations were not before the state Court. It is the Court's feeling that they properly could have been alleged in the objections to the accounting and claimed as a surcharge and were proper matters to have been considered by the County Judge's

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[9] This Court will not attempt to go behind the Supreme Court decision to guess at the Court's reasoning, but it appears obvious to this Court that very cogent support for the Florida decision might lie in the simple fact that if, in fact, the plaintiff was not incompetent, she could have made direct attack on the guardianship at any time during its pendency in the County Judge's Court. Instead she chose to accept its benefits and then (significantly after her marriage) made her delayed attack in the form of objections to the accounting after having accepted the benefits of the accounting. If she was in fact incompetent, then the equity of the guardianship for her benefit would be unquestioned. It should also be noted that we are dealing with an in rem guardianship of property within the jurisdiction of the Court, not an in personam proceeding.

Court in exercise of its jurisdiction.[10] However, as will appear below it is not necessary for the Court to determine whether or not a plea in bar is applicable to these allegations of negligent administration.

DEFENSE OF LIMITATIONS

As the chart in footnote 3, supra, clearly indicates this suit was instituted 8 years after the plaintiff was restored to competency. It was instituted almost 7½ years after the defendant filed a final accounting and 7½ years after the County judge entered order approving this accounting and provisionally ordered discharge. Yet the plaintiff contends that nonetheless the general statutes of limitations[11]

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[10] Although the negligence contentions are appropriately disposed of by such considerations of law, it may be noted that two of the three negligence paragraphs, alleging failure to collect promissory notes, are met in point of fact by undisputed affidavit proof that the one note complained of was an installment note kept currently paid throughout the administration in the same manner and amount that the ward had accepted before the start of the administration; and the other note did not mature until after defendant's administration terminated. Moreover, in the course of the Florida proceedings before the County Judge, between the first and second appeals to the Florida Supreme Court, plaintiff's attorney made an explicit signed waiver of all surcharge claims except one not here involved, in consideration of defendant's consent to defer execution of its judgment against plaintiff for guardian fees.

[11] F.S.A. § 95.11, "Actions other than those for the recovery of real property can only be commenced as follows: . . . (3) Within five years.—An action upon any contract, obligation or liability founded upon an instrument of writing not under seal. (4) Within four years.—Any action for relief not specifically provided for in this chapter. (5) Within three years.—(a) An action upon a liability created by statute, other than a penalty or forefeiture; (b) An action for trespass upon real property; (c) An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property; (d) An action for relief on the ground of fraud, the cause of action in such case not to be deemed as having accrued until the discovery by the aggrieved party of the facts constituting the fraud; (e) And

were tolled by the provisions of F.S.A. Sec. 746.14, providing a one year limitation from date of discharge.[12] This Court cannot agree with this contention. The one year special statute is on its face a statute of additional limitation. It would be a strained construction to hold that it was intended to exclude or toll the operation of the general statutes of limitation.

It is the duty of the Court to find for apparently conflicting statutes a reasonable field of operation which may preserve the force and effect of each statute and to harmonize them if possible. Ideal Farms Drainage District v. Certain Lands, 154 Fla. 554, 19 So. 2d 234 (1944). This Court does not have any great difficulty in ascertaining the purpose of the legislature in the enactment of F.S.A. Sec. 746.14 and reconciling it with F.S.A. Sec. 95.11. The former, special statute, is an additional statute of limitation. It does not displace the general statute in any way, but adds to it. Thus, if the one year period has expired, but the general statute has not yet run, the special statute will bar the action against the guardian. This is the holding of Beck v. Barnett National Bank of Jacksonville, 142 So. 2d 329 (Fla. App. 1962). However, no Florida case has suggested that F.S.A. Sec. 746.14 should be given the effect

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an action upon a contract, obligation or liability not founded upon an instrument in writing, including an action for goods, wares, and merchandise sold and delivered, and on store accounts. (6) Within two years.—An action by another than the state upon a statute for a penalty or forfeiture; an action for libel, slander, assault, battery or false imprisonment; an action arising upon account of an act causing a wrongful death."

[12] The statute in full is: "Upon the consideration of the application for discharge and of the objections thereto, if any, and of the evidence, if the county judge is satisfied that the guardian has faithfully and completely discharged his duties and has rendered complete and accurate final returns and has delivered the assets of the ward to the person entitled thereto, the county judge shall enter an order of discharge. Such discharge shall operate as a release from the duties of guardianship and as a bar to any suit against said guardian or his surety, unless such suit is commenced within one year from the date of discharge."

of extending the general period of limitations as urged here by the plaintiff. As this Court views the matter the harmony of the legislative scheme both in the general limitation section and in the Florida guardianship law would be perverted if, under the particular facts of this case, it should be held that the special statute operated as a toll.[13] Under this view, the Court need not reach the question of when the one year statute started to run. The plaintiff has urged that it did not run until the final order of discharge was entered after the completion of all litigation in the state Court. But it is noted that substantial reasons can be advanced for holding that the one year statute started running no later than the compliance by the defendant with the provisional order of discharge by the County Judge. This order was ultimately vindicated by the Supreme Court of Florida and even the second judgment of the high Court affirming the lower Court was dated more than one year prior to the institution of this suit.

The defendant has cited many cases to the effect that disability at and after the accrual of the cause of action did not toll the limitation statute. The Court need not express its view of this argument. Eight years elapsed from plaintiff's restoration to competency before this suit was instituted. Her husband, co-plaintiff, has never been incompetent. The trust relationship in regard to the property terminated some 7½ years prior to institution of this action by the turnover of the property by the bank to the plaintiff. Even if this was not true, the plaintiff is embroiled in the net of circular argument whereby she argues on one hand that she was never incompetent, and on the other endeavors with self-defeating sophistry to maintain that the statute was tolled by her disability. See cases annotated at 166 A.L.R. 960.

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[13] This Court is faced with the specific question as a matter of first impression in this state. However, we find that the Supreme Court of Florida in analogous situations has applied similar reasoning. See c.f., Palmquist v. Johnson, 41 So. 2d 313 (Fla. Sup. 1949); Perry v. Reichert, 113 Fla. 125, 151 So. 403 (1933).

In summary, the weakness of the plaintiff's position is plainly demonstrated if the problems of res judicata are ignored. If it is assumed arguendo that the plaintiff's contentions as to the nature of this action are accepted, it indeed would be an anomaly for this Court to also hold that a person sui juris could be precluded by a void probate proceeding from bringing this action for fraud and conspiracy at any time after the cause of action arose.[14] If plaintiff's contention is right, she has slept upon her alleged rights for a period considerably in excess of the statutory period of limitations.

The foregoing considerations will result in the entry of summary judgment for defendant on all issues other than the matter of withholding papers, paragraph 7 of Count II. The papers withheld are not specified in the complaint. The answer sets out a general denial, while the affidavit of the defendant's trust officer admits possession of papers but asserts that defendant is willing to turn any of plaintiff's papers over on payment of copying charges. Thus, this issue is not ripe for disposition on motion for summary judgment. Therefore the motion for summary judgment is granted as to all issues and all counts with the exception of paragraph 7 of Count II; the defendant may within five (5) days from the entry hereof notice for hearing its motion to dismiss said paragraph for failure to state a cause of action, which motion was filed but has not been noticed for hearing, and with leave to plaintiff's within ten (10) days from entry hereof to amend paragraph 7 of Count II to specify the papers withheld.

Entered at Miami, Florida this the 8th day of August, 1963.

EMETT C. CHOATE,
United States District Judge.

---

[14] See F.S.A. Sec. 744.61. And see Ritter v. Ritter, 219 Ind. 487, 38 N.E. 2d 997 (1942), Dye v. Dodd, 226 N.W. 565 (S. Dak. 1929).

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1957

Case No. 28,614

VIRGINIA WILLYS LUCOM (Formerly Virginia Willys de Landa), *Appellant*,

v.

ATLANTIC NATIONAL BANK OF WEST PALM BEACH, POTTER, LANGBEIN & BURDICK, J. W. SALISBURY, *Appellees*.

Opinion filed July 10, 1957. [97 So. 2d 478]

An appeal from the Circuit Court for Palm Beach County, Aquilino Lopez, Judge.

Clyde Trammell, Jr., and Charles M. Trammell, for Appellant.

J. W. Salisbury, for Appellees.

ROBERTS, J.

This appeal brings here for review an order of the Circuit Court of Palm Beach County affirming an order of the County Judge approving a final accounting of the appellee, Atlantic National Bank of West Palm Beach, as guardian of the property of the appellant during her alleged incompetency, and awarding fees and costs to the guardian and its attorneys. The appellant's principal contentions here are (1) that neither the guardian nor its attorneys are entitled to compensation because the entire guardianship proceedings were null and void; and (2) that, even if compensation is allowable, the County Judge erroneously applied a straight percentage of the gross value of the estate in fixing the amount of compensation payable to the guardian and its attorneys without considering the actual value of the services rendered.

The background against which these questions must be decided is as follows: Appellant was first adjudicated incompetent by the County Judge of Palm Beach County, Florida, in December 1952 during her confinement in the Pennsylvania Hospital in Philadelphia, Pa., for treatment of a mental illness. She was released from the hospital in April 1953 and was judicially restored to competency by order of the Circuit Court of Palm Beach County in May 1953. The appellee bank was appointed and acted as co-guardian of appellant's property during this period of incompetency. In July of 1953 her illness recurred and she voluntarily returned to the same hospital for further treatment. In what was apparently an attempt to follow the procedure approved in In re Cameron's Estate, 158 Fla. 91, 28 So. 2d 110, for obtaining the appointment of a guardian of the property in this state of a Florida resident who is adjudged incompetent by the Court of another state while temporarily residing there, a habeas corpus proceeding was initiated in a Pennsylvania Court by Appellant's son and daughter, allegedly on behalf of appellant, under the provisions of the Pennsylvania Mental Health Act of 1951, Sec. 1072 et seq., Purdon's Penna. Law. This proceeding culminated in an order of the Pennsylvania Court, dated Sept. 15, 1953, finding that appellant was "mentally ill" within the meaning of that Act defining "mental illness" as "an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care", and declining to release appellant from the Pennsylvania Hospital. Upon the basis of this order and the transcript of the habeas corpus proceedings in which it was entered, the County Judge of Palm Beach County, by order dated October 7, 1953, reappointed the appellee bank as guardian of the property of the appellant, the petition for such appointment having been filed by the appellants son and daughter, both sui juris. The appellant

was released from the Pennsylvania Hospital in December 1953 and returned to her home in Palm Beach, Florida. Sometime after May 1953 she established residence in the state of New York and, in October 1954, was adjudicated to be competent to manage her property by a Court of that jurisdiction. The questions presented here and in the Court below arose upon objections filed by the appellant to the bank's final accounting of its administration of her estate and application for compensation for itself and its attorneys.

There is some merit to the appellant's contention that an order adjudicating that a person is so mentally ill as to require further treatment in a hospital is not an adjudication of "incompetency" insofar as the ability to manage property is concerned. Cf. In re Weightman's Estate (Pa. Super. 1937) 190 A. 552; In re Refior (Pa. Super. 1947) 50 A. 2d 523, 527; In re Lambert (N. J. Super. 1954) 109 A. 2d 423; Fleming v. Bithell (Idaho 1935) 52 P. 2d 1099; People v. McConnell (Cal. Dist. App. 1927) 252 Pac. 1068; Manello v. Bornstine (Wash. 1954) 270 P. 2d 1059. But this question need not be decided, since we are here dealing with a fait accompli—the appellee bank was re-appointed by the County judge, accepted the guardianship in good faith, and has executed the trust to the best of its ability. Even if not a guardian de jure, the bank was a guardian de facto of the appellant's property and, as such, is entitled to an equitable credit for expenditures which were made in good faith for the ward, Alexander v. Hillebrand (Mich. 1905) 103 N. W. 849; Smith v. Cameron (Mich. 1909) 122 N. W. 564; Pemberton v. Leatherwood (Tex. Civ. App. 1949) 218 S. W. 2d 500; Maryland Casualty Co. v. Lawing (N. C. 1945) 33 S. E. 2d 609; In re Beisel's Estate (Cal. 1895) 40 Pac. 961; and, in the proper circumstances, a guardian de facto is entitled to reasonable compensation for its services in behalf of the ward. See Kelly v. Kelly (Mont. 1931) 297 Pac. 470; Jessup v. Jessup (Ind. App. 1897) 46 N. E. 550; Harwood

v. Boardman (1866) 38 Vt. 554. But see Powers v. Chisman (Ark. 1950) 231 S. W. 2d 598.

In all the circumstances here, we think the appellee bank is entitled to compensation for its services rendered in good faith to the appellant and that the lower Courts did not err in so holding. The same thing is true of the services of counsel employed by the appellee bank.

But the compensation allowable to the bank, as guardian, must be "just and reasonable", Sec. 745.32, Fla. Stat. 1955; and those allowable to the attorneys must have been rendered "to the ward or to the guardian in the ward's behalf", Sec. 745.33, Fla. Stat. 1955. In the absence of statutory authorization therefor, the Court cannot arbitrarily fix a fee schedule and, without evidence of reasonable value of the services rendered, determine what is "just and reasonable" compensation. See In re Messer's Guardianship (Wis. 1943) 7 N. W. 2d 584.

Insofar as the compensation awarded the appellee bank is concerned, it appears that the Court's determination may have been based, in part, upon a consideration of comparable fees allowed by statute to executors and administrators for the administration of decedent's estates, Sec. 734.01, Fla. Stat. 1955. But there was other evidence as to the services rendered by the appellee bank and the reasonable value thereof, sufficient to support the award of compensation. Accordingly, the appellant's contention that the compensation awarded to the appellee bank was a "gross abuse of discretion" cannot be sustained.

As to the amount of the fee awarded to the appellees Potter, Langbein and Burdick, as counsel for the bank, an entirely different situation is presented. The record shows that in all litigation instituted or defended by the appellee bank in behalf of the ward the bank was represented by other counsel; and in most of the litigation these appellees acted as counsel for the appellant's son or daughter, or

both, in opposition to the appellee bank or to the appellant. All of the testimony adduced by appellees on the matter of their fees was based on a percentage of the value of the incompetent's estate, although there was testimony of the value of "extraordinary" services performed by counsel, such as representing the appellant's son in obtaining his appointment as guardian of an infant daughter of appellant, and rendering "supervisory" services over litigation actually conducted by other out-of-state or local counsel employed by the appellee bank for that purpose. The order allowing compensation to these attorneys did not set forth the particular services for which compensation was granted, so we are unable to tell what claims were granted and which were disallowed. In all the circumstances here, we think the ends of justice require that the compensation order be reversed as to the appellees Potter, Langbein and Burdick, and the cause remanded for further consideration of this question, remembering that a Court "is without power to measure an attorney's fee except on the basis of quantum meruit or a quid proquo," Brickell v. Di Pietro (1943) 152 Fla. 429, 12 So. 2d 782, and that under the statute the only services compensable are those rendered either to the ward or to the guardian in the ward's behalf.

The appellant also questions here certain items of costs claimed by the appellee bank and the appellees Potter, Langbein and Burdick. Three of the items relate to the activity of the appellee counsel in attending the New York proceedings by which appellant sought and obtained an adjudication of her competency, in which the appellee counsel represented the appellant's son and daughter (not the appellee bank, which employed other counsel) and unsuccessfully opposed the appellant's petition. Clearly, these are not proper items of expense incurred on behalf of the appellant. Two of the items are attorney's fees for out-of-state counsel employed by the bank—one for the New York counsel who was employed by the appellee bank

to "stand by" and observe the New York proceedings referred to above, the bank taking a position of strict neutrality in the proceedings; and the other for Philadelphia counsel who successfully opposed the appellant's suit for a declaratory decree as to the effect of the September 1953 order entered in the habeas corpus proceedings which formed the basis for the appointment of the bank as guardian of appellant's property. Both of these expense items appear to have been incurred solely for the benefit and protection of the guardian itself, and not for the appellant's benefit or protection. They were not, therefore, items of expense properly chargeable against appellant.

The remaining item is a charge of $50 incurred by appellee counsel as a fee to an attorney employed by them to investigate Wilson C. Lucom, whom the appellant married in May of 1954, some five months after her release from the hospital. Appellee counsel contend that this is a proper charge against appellant because it was to the interest of appellant's minor child (who was under the guardianship of appellant's son) to have information concerning her mother's new husband and it was thus a proper charge against appellant "for the care, support and maintenance of the dependents, if any, of the ward," as authorized by Sec. 744.64, Fla. Stat. 1955. This contention is obviously without merit, and no other basis for this charge has been suggested nor can be conceived.

The other questions presented here by the appellant have been considered and no reversible error has been found.

Affirmed in part and reversed in part and the cause remanded for further proceedings not inconsistent herewith.

TERRELL, C. J., THOMES, THORNEL and O'CONNELL, JJ., Concur.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 123

VIRGINIA WILLYS LUCOM and
WILSON C. LUCOM,

Petitioners,

v.

ATLANTIC NATIONAL BANK OF
WEST PALM BEACH, FLORIDA,

Respondent.

RESPONSE TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 123

VIRGINIA WILLYS LUCOM and
WILSON C. LUCOM,

Petitioners,

v.

ATLANTIC NATIONAL BANK OF
WEST PALM BEACH, FLORIDA,

Respondent.

RESPONSE TO PETITION FOR CERTIORARI

Supplemental Statement of the Case

The petition seeks to infuse a minor question under state statutes of limitation with the dignity of the civil rights battle. Petitioners' argumentative Statement of the Case as a gross violation of civil rights requires that we correct some of the erroneous statements of fact and law with which they have loaded their Statement, before we can reach that small point of limitation law. We supply this Supplemental Statement to disabuse the Court of

petitioners' presentation of the facts as involving "railroading" (Pet. 17) whereby the petitioner wife was "erroneously charged with being mentally incompetent" (ib 18), and "fraudulent concealment" (ib 28) whereby to toll the limitation statutes.

I. *The petitioner wife's incompetency:* — The record leaves no doubt that when this guardianship started in September 1953 the petitioner wife was in fact incompetent. She was institutionalized in Philadelphia, under electric and insulin shock therapy for a recurrence of the paranoid schizophrenia (RI, 343) that had led to an earlier 1952 guardianship not here in litigation, from which she had been — by hindsight prematurely — restored just a few months before in May 1953 (RI, 46, 72).[1] The complaint never even alleges factual competency. (RI, 8, 15, 180)

Her mental state was so bad that the attending physicians felt it would harm her even to bring her to the Philadelphia courtroom (RI, 344, 355). One psychiatrist testified that the night before the hearing there, notwithstanding improvement after 14 insulin shock treatments, she still thought she was married to Franklin D. Roosevelt,

[1]Petitioners' statements that the wife's first hospitalization in 1952 resulted from her son's "efforts to seize control of her financial affairs by having her declared mentally incompetent" (Pet. 5), and that during the wife's second hospitalization in 1953 the son "continued to demand $75,000 from her; upon her refusal he succeeded in obtaining $10,000 without her authority from her brokerage account in New York" (Pet. 6), have no foundation in this record. The point of the latter charge is the further assertion that a law firm (alleged coconspirators—RI, 180) that later became counsel to the bank "represented the son in these various efforts to obtain money from the petitioner wife" (Pet. 6). The record here shows, on the contrary, that the attorneys were not consulted until just before the second hospitalization, and that they urged the son to abandon any attempt to get money from his mother (RI, 483-8).

Jr., a daughter was placing baby chicks in her hospital room to annoy her, her dead parents were alive, her only son John had a twin brother who visited her at the hospital (RI, 349ff).[2]

Her plight demanded not just medical attention for her person but the legal protection for her property that the guardianship supplied. One of her ex-husbands, Mark Martin, had obtained from her $37,000 and a general power of attorney to himself, both during the short period between her restoration in the spring of 1953 after the first guardianship, and her readmission to the mental hospital in Philadelphia that summer just before the instant second guardianship (RI, 233-7). Even after her readmission Martin got a check for $50,000 from her, but the hospital staff intercepted the check and she got it back (ib235-6, 359).

The physician who testified about the Martin check also testified that she had difficulty understanding about her finances and her property and that she did not even seem to be aware that Martin was handling her money (RI, 358: cf 368). Thus the guardianship was essential to protect her estate from depredation.[3] These facts demonstrate that she was then patently incompetent within the statutory definitions of either Pennsylvania or Florida.[4] They also explain why the record shows no attempt by peti-

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[2]Further on her Mrs. Franklin D. Roosevelt, Jr. delusion, see her October 1953 letter (RI, 316-7), acknowledged in her deposition (RI, 230 ff, 295-6).

[3]The guardianship petition recited the danger that Martin would dissipate the estate, RI, 48.

[4]These definitions, both turning on inability to manage one's property, Pa. P. L. 612, June 28, 1951 ¶102(3) [cited as P.L. 158 in the opinion below, Pet. App. 2a], FS §744.03(5), are printed in the Appendix infra, p. 1a, 2a.

tioners at all in any state court, and no serious attempt below, to prove up her competency.[5]

II. *The Pennsylvania adjudication that the petitioner wife was "mentally ill":* — Having by way of introduction presented the false picture of a competent woman railroaded, petitioners then (Pet. 6-7) attack the Pennsylvania habeas corpus proceeding that led to the Florida guardianship. They say — incorrectly — that the proceeding was "nonadversary".[6] They find fault that in the habeas corpus order Judge Bok found the petitioner wife "mentally ill" but declined to find her "incompetent",[7] a factor which we shall show the Florida court considered and held immaterial. Indeed they fail to disclose that it would have been beyond the statutory jurisdiction of a Pennsylvania court to make the incompetency adjudication in the absence of a showing that she was either a Pennsylvania resident or a Pennsylvania property holder.[8] See *In re Card*, 177 Pa. Super. 502, 110 A2d 856 (1955). Thus the Pennsylvania statutes simply do not permit what pe-

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[5]On this score the record contains only her pathetic self-serving 1963 affidavit (RI, 380ff), in which she purports to demonstrate "evidence of my competence" in 1953 by appending two lucid letters she wrote while in the mental hospital, one a few weeks before and one a few weeks after the "Mrs. Franklin D. Roosevelt" letter, p. 3 n. 2 above.

[6]Her personal counsel, the late J. W. Salisbury of Palm Beach, who later on became her guardian ad litem in the Florida proceeding, and still later cocounsel for the bank at her own suggestion, appeared for her (RI, 336, 337, 345-6, 348, 360; RII, 258-9). He is named in the complaint as a coconspirator (RI, 181 ff.)

[7]The complaint alleges (¶¶6, 16, 18-RI, 19, 23, 189) that the Pennsylvania order did not adjudicate "incompetency" but only "mental illness," and would have been procedurally insufficient as an adjudication of incompetency.

[8]The Pennsylvania incompetency procedure statute, P.L. 612, June 28, 1961, §301, is printed in the Appendix infra, p. 2a-3a.

titioners suggest was lacking here, and Judge Bok, commenting on the fact that she was a Floridian without Pennsylvania property, and with Florida property on which Florida guardianship was contemplated (RI, 338, 363), did what Pennsylvania law let him do.

Moreover petitioners made this very attack (and others) on the 1953 Pennsylvania habeas corpus, by a 1954 Pennsylvania declaratory judgment proceeding (RI, 60, 70ff). The record here does not show the failure of that attack, but we state the off-the-record fact of its failure, as a plain inference from this record. Had petitioners obtained their declaratory judgment in Pennsylvania they would not have had to invite either Florida or federal courts to speculate about Pennsylvania law.

III. *The Florida adoption of the Pennsylvania adjudication:* — Petitioners assert that the Florida adoption of the Pennsylvania "mentally ill" adjudication in lieu of an independent Florida incompetency proceeding violated Florida law and thus made the guardianship "null and void" (Pet. 8-9). They rest this plausibly enough on quotation of the statute, FS §744.31, that forbids guardianship of a Florida *resident* without separate incompetency adjudication under still another statutory procedure that no one contends was here used. But the District Court's opinion (Pet. App. 18a) has already brought to their attention —and we submit they should have brought it to this Court's attention before making loose charges of "railroading"— that the Florida Supreme Court has held that the statute on which they rely need not be complied with where the Florida resident is temporarily hospitalized outside the state: such a person is held to be subject to the *non-resident*

provisions of the Florida guardianship law. *In re Cameron's Estate*, 158 Fla 91, 28 So2d 110 (1948).

Under this non-resident procedure, FS §744.19, the District Court below pointed out, Pet.App. 18a-19a, a Florida guardian may be appointed simply on exemplified copy of an adjudication of "unsoundness of mind" in the state of hospitalization, which is "prima facie proof of such incompetency".[9] This is just what took place here. RI, 52, 56, 336ff.

IV. *The asserted newly discovered evidence of the respondent bank's participation in "conspiracy":*—Petitioners complain of the refusal of the courts below to grant their Rule 60(b) motion, to set aside the 1963 summary judgment for alleged evidence of fraud and conspiracy that they say they later discovered in 1963 - '64.[10] Petitioners have not included, among the opinions from several courts they reprint in their petition, the opinions of the District Court disposing of that evidence (from 1700-plus documents, R III, 458, and two days' deposition testimony of the bank's trust officer, R II, 19ff). In those opinions the District Court characterized that evidence as "a collection of insignificances" that "establishes no fraud at all", and their motion based thereon as "scandalous" and "frivolous"

[9]Petitioners' quotation of FS § 744.19 (Pet. 9) stops neatly short of the operative words on which the District Court turned its rejection of their contention, i.e., the sentence "Such adjudication shall constitute prima facie proof of such incompetency," quoted in the District Court's opinion (Pet. App. 19a n. 7).

[10]It should perhaps be explained that the occasion for the new evidence was that the 1963 order, which petitioners and we alike call a summary judgment, was in fact a partial summary judgment, and it was discovery proceedings under the surviving portion of the case (Count II, ¶7: RI, 29) ultimately dismissed (RI, 514; RIII, 612 ff, 615; Pet. App. 8a) that turned up the evidence in question.

(RIII, 608-9, 612-7, 631-2).[11] In their petition here, thankfully, they have abandoned most of that vast mass of material, to concentrate on one piece of the asserted new discovery, viz., that the bank knew of an alleged [1954] plan of the son, represented by one of the two law offices that represented the bank, to have his mother recommitted, to petition for his own appointment as guardian of her person, and to have petitioners' marriage annulled, all at a time when the trust officer and another of bank counsel considered this lady competent (Pet. 5, 14).

But petitioners' Statement omits all mention of the event that triggered off most of the events there recited, and superseded the until then prevailing belief by all concerned that she was competent again: the petitioner wife suffered a sudden mental relapse (RIII, 443).

At this time her personal physician and her personal attorney (who was also, it will be recalled, then cocounsel for the bank, supra p. 4 n. 6) had even started routine proceedings for a Florida judicial declaration of restoration to competency (RIII 443-4). But when this physician and a consulting phychiatrist determined she had relapsed, the attorney and the physicians abandoned the restoration proceeding, the petitioners were married after a reported acquaintance of only a few days, the son initiated the obviously appropriate action by way of petition for personal

[11]For some reason that we have never comprehended, petitioners have included in the record-on-appeal some of not only their but our District Court briefing on this motion (RIII, 398-443, 489-501, 509-527, 574-595). This may at least have the utility in this Court of pointing to the evidence covered by the District Court's remarks.

guardianship looking toward annullment; and all this was reported to the bank[12] (ib.).

In their Argument petitioners treat the newly discovered evidence as discovery of a concealment that serves to toll the fraud statute of limitations (Pet. 28-9), and this we too shall argue below as a matter of law. Whether or not the facts of this "conspiracy", even as petitioners present them in their Statement, would survive a motion for summary judgment or for directed verdict is not material at this stage of the case. See *United States v. Falcone*, 311 US 205. But we do deem material enough to set straight in this Supplemental Statement petitioners' misleading presentation of the bank as cynically standing by in the face of conspiracy to treat its ward as crazy although the bank "knew" (Pet. 5) her to be sane. By reciting the trust officer's initial opinion that the wife was competent, and suppressing the experts' later (and of course controlling) opinion that she had relapsed into incompetency as well as the trust officer's awareness of that expert opinion, petitioners have produced a lopsided treatment of the facts. This we cannot let pass in silence, lest it achieve its patent purpose of inducing this Court to believe that the local and technical ruling below hides miscarriage of justice.

To restate this head of the case succinctly, a bank that accepted and discharged a guardianship "in good faith" as the Florida Supreme Court found (Pet. App. 27a), and

[12]The reports to the bank, as they stand in the record, do not show precisely when the bank became aware that the physician was of the opinion to which he testified a few days later, viz., that the sudden relation between petitioners contributed to the relapse (RI, 456-8, 462-5). But the son's action clearly expressed an entirely legitimate concern that his mother, once before in this record subjected to undue influence by another man in a prior episode of mental illness, supra p. 3 n. 3, might be victimized again.

turned back in 1955 more assets than the ward had when the bank took over in 1953 (RI 334-5), is still being harassed in this Court in 1966 on factual allegations of concealment of fraud, that the District Court and the Court of Appeals have both found groundless.

SUMMARY OF ARGUMENT

1. The Court of Appeals decision rejecting petitioners' contention that this case is governed by a Florida limitation statute that had not run, and accepting respondent's contention that it was governed by another Florida limitation statute that had run, is one of those matters of local law that this Court does not review on certiorari. Moreover the judges who wrote the opinions below at both the District Court and Court of Appeals levels rejecting petitioners' contentions as to state law are particularly experienced in Florida law, so that the case is governed by this Court's practice of especial deference to such opinions. The case does not acquire weight for certiorari purposes from the fact that it charges 14th Amendment violation, for it falls within this Court's settled doctrine that tort suits on even 14th Amendment rights are barred when the appropriate state limitation statutes run.

2. Petitioners' contention that no statute of limitation can operate at all on the void judgment count because a void judgment can be collaterally attacked at any time, was defeated years ago by their failure to take certiorari when the Florida Supreme Court rejected their underlying contention that the judgment was void. That court, having the parties to the contention of voidness before it,

had jurisdiction to determine its own jurisdiction, so that on default of direct resort to this Court then, the assertion of voidness is no longer available in any court.

3. Petitioners claim that the courts below erred in not allowing a jury to pass on their contention that the limitation statute on their cause of action for fraud and conspiracy was tolled by concealment. Since this was raised as a matter of newly discovered evidence, after the basic summary judgment against them, this matter was largely discretionary with the District Court. But the District Court's purely factual ruling that the new evidence "establishes no fraud at all" is not a matter for certiorari; and even were it erroneous no right to jury is involved because petitioners have never introduced any evidence to controvert respondent's proof that (1) the documents petitioners assert were concealed were many times tendered to their counsel for inspection, and that (2) petitioners knew all along the substance of what the documents recited. Hence there was no factual question of new discovery to go to a jury at all.

ARGUMENT

I. There is no occasion to review the lower courts' choice of governing limitation statute, because this is a matter only of state law.

The petition acknowledges a "traditional reluctance" of this Court to grant certiorari for asserted federal court error as to state law (Pet. 18). One of its authors has indeed elsewhere stated the point less hesitantly, i.e., that

absent "an exceptionally clear showing of error" this Court "refuses to add its conjecture to that of the court of appeals" and therefore "uniformly declines review" of such cases (*Stern & Gressman, Supreme Court Practice*, 3rd Ed, 134). The two cases petitioners now cite as guides for exception to that uniform declination happen not to involve either petition or decision on the ground of error of state law.[13] Nor, we submit, is the instant case a proper occasion for exception: —

(1) It will be unnecessary to rehash the Florida case law discussed in the opinions below. This Court has maintained an especial deference to the local law decisions of federal judges of large experience in that law, such as the authors of the opinions below, Senior District Judge Emett C. Choate of Miami and Senior Circuit Judge Warren L. Jones of Jacksonville. For this Court to enter upon review of such decisions they must appear to be "plain error", *Francis v. Sou. Pac. Ry. Co.*, 333 US 445, 447-8; "unreasonable", *Propper v. Clark*, 337 US 472; "clearly wrong", *The Tungus v. Skovgaard*, 358 US 588. The opinions below disclose that their authors were quite aware that the precise question of the order in which these two Florida

[13]Reading the petitions in **Dick v. New York Life Ins. Co.**, 359 US 437, and **Moore v. Ill. Cent. Ry. Co.**, 312 US 630 (Pet. 18), will confirm that in neither was error of state law even asserted, but error of federal court procedure only. In **Dick**, this Court had no doubt that the Court of Appeals "appears to have applied the state standard" (at 445), but reversed because that court committed the procedural error of "resolving a factual dispute" (ib) in taking from the jury a case that the District Judge had left with them. In **Moore**, the reversal was not for misinterpreting state law but for presuming to interpret state law at all, on removal after remand, once state law had been announced by the state's highest court as the law of the very case: "The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not" (at 632).

limitation statutes should run was novel (Pet. 4a, 23a, n. 13;) and their rejections of petitioners' contention on that novel question, each after painstaking independent analysis of the Florida precedents on other limitation statutes, cannot be fairly read, within the quoted tests, as "plain error", "unreasonable", "clearly wrong".

(2) Faced with the impassable authority of the opinions below, petitioners resort to three assertions of Florida law not already explicitly rejected in those opinions. Petitioners can be shortly shown wrong on all three: —

First, they advance *Am. Surety Co. v. Andrews*, 152 Fla 638, 12 So2d 599 (1943) (Pet. 23n.), as holding the four-year general statute inapplicable to suit, as here, by former ward against discharged guardian for acts [improvident investments] more than four years before suit was filed — although the statute is not mentioned in that opinion. They fail to disclose that the other report of the case, s.n. *Turner v. Andrews*, 143 Fla 88, 196 So 449 (1940) makes plain that the statute could not have been involved; for the suit was not pleaded as a devastavit for making the investments themselves, but for an improper final accounting on them made less than four years before suit filed.

Second, in support of their conjecture that guardianship itself tolls or displaces the Florida general limitation statute during the period of guardianship, petitioners twice assert that suit by ward against guardian "could only have been brought *after* the final discharge of the guardian" (Pet. 23, their emph.; rephrased ib26). But the ward's right to sue the guardian during guardianship was classic

common law, *Co. Litt.* *54a, even attributed to the 13th century, *Coke, 2nd Institute* *306, Comm. on Stat. Gloucester, 6 Edw 1 c. 5. That right persists in Florida, for the county judge's court sits to hear "complaints by wards against guardians", FS §744.06(1); and *In re White*, 140 So2d 311 (1stD1962) is just such a suit by restored ward against guardian *during* guardianship. Although petitioners turn this point on reference (Pet. 22) to the "restrictions placed by law on the right of a ward to sue his guardian during the period of guardianship", *Beck v. Barnett Natl. Bk.*, 117 So2d 45, 49 (1stD1960), *White* indeed makes clear that these are restrictions only on in what court and in what name the ward sues, not at all on suit during guardianship.[14]

Third, petitioners cite *Bloxham v. Crane*, 19 Fla 163, 172 (1882) and *Fisher v. Guidy*, 106 Fla 94, 142 So 818 (1932), as holding that the trust relation between guardian and ward tolls the four-year statute for the duration of the guardianship (Pet. 26). They briefed this below, RI, 394ff. Why the courts below deemed these cases too far out of point to mention is obvious on reading the cases. The wards' suits were to enforce wards' trust rights in wards' funds held by guardians; but that sort of suit falls within a specific clause of the general limitation statute that exempts suits "with respect to any moneys or property held or collected by any *** trustee", L. 1872, c. 1869 §15,

[14]Mrs. White, just like Mrs. Lucom here, was a restored ward suing in her own name, 140 So2d, at 312. For an unrestored ward, the statutory right to sue the guardian is developed in FS § 744.61 (App. infra, p. 1a), as one of three sorts of suits that occur during guardianship: third-party suits by or against the ward are conducted in the guardian's name, but the court is to appoint a guardian ad litem for suit "by the guardian against the ward or vice versa," a provision that is nonsense except during guardianship.

now FS §95.02, quoted as controlling in *Bloxham*, at 171-2. Here, however, the suit is not to enforce the trust "with respect to any moneys or property held or collected", but in tort for damages.[15] Such statutory tolling of a trust suit does not entail tolling the instant tort suit, any more than the statutory tolling of a suit by an insane person to recover real estate tolls his tort suit for slander of its title, *Carey v. Beyer*, 75 So2d 217 (Fla 1954). It is granite Florida law that each tolling statute is specific, and none may be read the least bit beyond its very language. *Faulk etc. v. Harper*, 62 So2d 62 (Fla 1952); *In re Aron's Estate*, 118 So2d 546 (3dD1960).

Without further exploration of the detail of these three contentions of Florida law, such as would be appropriate to briefing on the merits, we submit that plaintiffs have failed to demonstrate that "exceptionally clear showing of error", *Stern & Gressman*, loc. cit., requisite for certiorari.

(3) Since petitioners know the question they raise is otherwise too provincial to bring to the attention of this Court, they seek to inflate it to "significance and substantiality" (Pet. 16), by casting themselves as "proxies" (ib) to vindicate the 14th Amendment rights of the mentally ill. But it is long settled that a civil suit for damages for violating even 14th Amendment rights is barred when the appropriate state limitation statute runs. *O'Sullivan v. Felix*, 233 US 318.[16]

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[15]Moreover, the trust relation terminated in 1955 on approval of final accounting and turnover of the ward's assets against receipt (RI, 85, 88). The retention of small funds after final accounting, criticized Pet. 10 n. 7, is authorized by statute, FS § 746.13(2).

[16]Hence it is not necessary to debate with petitioners the correctness of the view of the Court of Appeals that no 14th Amendment question, because no state action, was here involved (Pet. 30). As petitioners note elsewhere, that was dictum (ib 15).

II. There is no occasion to review petitioners' constitutional claim that the case arises from a void order, because the petitioner wife failed to attack the order by certiorari when the state's highest court affirmed it.

Petitioners assert that even if the courts below selected the right state limitation statute, no limitation statute at all can constitutionally operate because the whole case originates in the guardianship order they deem void and therefore subject to collateral attack "at any time" (Pet. 27-8). In restating the case, supra p. 4-6, we have reviewed some of the reasons which led the courts below to reject petitioners' contention that the order was void. But even were their point sound, petitioners cannot now reassert it in this federal court suit, for the wife claimed it and lost it in her state court suit over guardianship fees.

(1) Petitioners say "None of the courts below, federal or state, have passed upon or denied petitioners' claim that the appointment order was in fact void although the Florida Supreme Court *** conceded that there is 'some merit' to petitioners' arguments" (Pet. 28 n. 19; also 33). The quoted statement is erroneous as to the District Court below (see Pet.App. 15a). More important, it is erroneous as to the Florida courts. The petitioner wife made this voidness claim in the Florida courts, and they decided it against her.[17] In the Florida Supreme Court she assigned as er-

[17]Petitioners' paraphrase of the Florida Supreme Court opinion begs the question: that court did not, as petitioners assert, concede "that there is 'some merit' to petitioners' arguments" as to voidness, but only that

rors that the appointment was "invalid and void", that the appointment procedure deprived her of "due process" under the 14th Amendment and the like provision of the state constitution, and that therefore no guardianship compensation could lawfully be awarded (RI, 10lff-¶¶4, 8, 10).[18] When the Florida Supreme Court, notwithstanding those assignments, refused to hold the bank and its attorneys volunteers not entitled to statutory guardianship fees from the guardianship estate, that court necessarily held as a matter of law that even assuming irregularity in the appointment procedure, this was not so substantial as to make the guardianship void and the adjudication of guardianship fees the taking of property without due process that the assignments claimed.

To be sure, it would have saved all concerned much trouble had that phase of the opinion been more detailed. But the Florida Supreme Court made clear enough that it was deciding rather than declining to decide the contention of voidness, for that court specifically noted it,[19] and by allowing the compensation (subject to recomputation of the attorney fees) disposed of that contention with the rest of the case.[20] The petitioner wife made sure the court did not by inadvertence fail to realize that this decision was an adjudication on due process: she petitioned for re-

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there is some merit to recognizing a distinction between mental illness and incompetency. Pet. App. 27a.

[18] In the lower Florida courts, RI, 60-¶1; RI, 61-¶¶B, 2; RI, 93-¶¶5, 7.

[19] "The appellant's principal contentions here are (1) that neither the guardian nor its attorneys are entitled to compensation because the entire guardianship proceedings were null and void***" (Pet. App. 25a).

[20] "The other questions presented here by the appellant have been considered and no reversible error has been found" (Pet. App. 30a).

hearing, retendering that issue in those very words.[21] When the court, unmoved, rejected that petition (RI, 118), there could no longer be any further doubt that its fee awards were an unequivocal answer to the questions of voidness petitioners now say were never passed upon.

Still persisting, she made the same contentions again a couple of years later in 1960, when she appealed the attorney fee order entered on the remand;[22] and again the state court awarded compensation notwithstanding (RI, 167, 173).

(2) If the petitioner wife deemed herself fobbed off by the Florida Supreme Court's failure to agree with her that voidness of the guardianship proceedings precluded award of compensation, she threw the contention of voidness away by failure then to press it to this Court by certiorari. As the District Court stated it:

> "Plaintiff seeks to apply the doctrine that a void judgment is open to collateral attack at any time. But this doctrine is itself subject to the limitation that there can be only one attack on even a void judgment, for an unsuccessful or abandoned attack becomes itself an adverse adjudication" (Pet.App. 18a).

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[21] "On this point a rehearing is requested to determine whether the accomplished fact obviates the necessity of complying with the statutes and whether the taking of property, including the compensation to the guardian and its attorneys under such facts did not amount to taking property without due process of law" (RI, 114-5, our emph.).

[22] "The Court erred in allowing any compensation to Potter, Langbein & Burdick on the ground that there being no legal guardianship, any compensation to them amounts to taking property of Respondent without due process of law as provided in the Florida Constitution and the 14th Amendment to the U. S. Constitution" (Assignment #38, RI, 164, our emph.).

The District Court rested its view on citation of a few of the many cases on that point. *Grubb v. Public Utilities Comm.*, 281 US 470;[23] *Am. Surety Co. v. Baldwin*, 287 US 156, 164-6.[24] *Angel v. Bullington*, 330 US 183.[25] Obviously the District Court selected these three cases because in each of them the adverse decision on a mere tender of the 14th Amendment question was held to bar, although the state court no more than here used 14th Amendment language.

This group of cases does not stand alone. It is settled in the law of judgments that a court which has the parties or their privies [26] before it has jurisdiction to determine its own jurisdiction against a charge that the proceedings before it are void, and this makes its determination immune to collateral attack even were it erroneous. *Forsyth v. Hammond*, 166 US 506; *Baldwin v. Iowa State Travelling Men's Assn.*, 283 US 522; *Stoll v. Gottlieb*, 305 US 165; *Chicot County Drainage Dist. v. Baxter State Bk.*, 308 US 371; *Durfee v. Duke*, 375 US 106. And it is equally settled, as a matter of the jurisdiction of federal district courts, that a litigant who has lost a constitutional argu-

[23] "The question of the constitutional validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it," 281 US, at 477-8.

[24] "Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice, the Surety Company cannot utilize the same issue as a basis for relief in the federal court. Federal claims are not to be prosecuted piecemeal in state and federal courts***," 287 US, at 169.

[25] "[T]he decision of the North Carolina Supreme Court concluded an adjudication of a federal question even though it was not couched in those terms," 330 US, at 189.

[26] While the husband asserts independent claim in the fraud and conspiracy counts, he could not claim as to the void judgment count that he is not bound by what binds his wife (cf Pet. 32-33).

ment in the highest court of a state must go to this Court direct. *Rooker v. Fidelity Trust Co.*, 263 US 413; *Trenies v. Sunshine Mining Co.*, 308 US 66, 77-8; *Warriner v. Fink*, 307 F2d 933, 936 (5th Cir); *Williams v. Tooke*, 108 F2d 758 (5th Cir).

III. There is no occasion to review petitioners' procedural claim that the question of fact whether the three-year fraud limitation term was tolled by concealment should have been left to a jury, because there was no question of fact.

Petitioners' other grievance is that the District Court failed to impanel a jury to dispose of their 1964 Rule 60(b) motion as to newly discovered evidence introduced into the record only after the basic 1963 summary judgment against them, a suggestion so boldly novel that we quote it in footnote rather than risk distortion by paraphrase.[27] If we understand this language, petitioners are saying that respondent's mere refusal to capitulate to their claim of newly discovered fraud raised issues that required the trial judge to impanel a jury. Thus they would have

[27] "The Court of Appeals below, however, proceeded to affirm the summary denial of the motion that sought to produce newly discovered evidence of fraud. And it further ruled, without the benefit of any jury determination of the disputed facts, that the alleged fraud had in fact been discovered by the petitioners as early as 1953 and hence was barred by the three-year fraud limitations period of § 95.11. See Appendix A, p. 7a, infra. In so ruling, the court below has effectively deprived the petitioners of their right to a jury determination of these fraud issues, a right guaranteed by Florida law. The denial of that right is compounded here by the decisive impact of that denial upon the running of the limitations period" (Pet. 29; see also ib 3).

him abdicate what one would have thought his ordinary duty to see whether there was any proof at all that it was actual new discovery, 6 *Moore, Federal Practice,* §59.03, and also what one would have thought his ordinary discretion to make the initial determination that the new fraud evidence was "of such a material and controlling nature as would probably induce a different conclusion", 7 *Moore, Federal Practice,* §60.23[4].

It is not necessary that we explore the District Court's factual ruling that the new evidence "establishes no fraud at all", discussed in our Supplemental Statement, supra p. 6. For the Florida law petitioners adduce in support of their assertion of conflict by no means squarely supports their position that on motion to set aside the summary judgment for newly discovered evidence they were entitled to jury trial of their contention that the fraud limitation was tolled by concealment. The case law they cite, *Metcalf v. Johnson,* 130 So2d 864, 868 (Pet. 28), turns out to be at best Florida mention of Georgia dictum in another context, hardly the sort of conflict that invites correction by exercise of this court's certiorari jurisdiction.

Moreover, in view of the underlying theme of the petition, that the ordinary standards for certiorari should be here relaxed out of alertness to the rights of the mentally ill, it has to be recognized that the facts do not permit petitioners to fairly claim that mental illness had anything to do with concealment or tolling. Although the petitioner wife's incompetency terminated in 1954 by judicial decree and the husband has never been incompetent, the substance of the alleged newly discovered facts was discovered by petitioners by 1954, and the corroborative detail docu-

ments that they saw in 1964 were available to them by 1955, years before this 1962 suit:—

(1) *The uncontradicted evidence that the alleged concealed documents were tendered for inspection.* The one specific head of new evidence that petitioners have deemed appealing enough to recite is the alleged 1954 conspiracy to rehospitalize the wife and void the petitioners' marriage (Pet. 14), reviewed supra p. 6-9.[28] But the bank files, which petitioners claim would have led them to make broader investigation and more timely suit had they known before the 1963 summary judgment what those files contained, had been many times over many years freely looked into by at least one of petitioners' present counsel, Hon. Charles M. Trammell.[29]

(a) *The trust officer's affidavit and deposition on inspection.* In May 1963, in support of the bank's motion for summary judgment, the bank's trust officer gave an affidavit to this effect, which was not denied.[30] In January 1964, after the August 1963 summary judgment, the trust

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[28]Petitioners also presented below other alleged newly discovered evidence of concealed 1953 fraud. See note 11, p. 7 supra. But since we assume that they have put their best foot forward in their petition we neither discuss the evidence they do not discuss, nor the evidence that led the Court of Appeals to point out that virtually all the facts relied upon as constituting the 1953 fraud were asserted in the 1954 collateral attack on the guardianship (Pet. App. 7a).

[29]There is also uncontradicted evidence that in 1954 the bank files had been tendered to Hon. Myles J. Lane, formerly of the wife's counsel, but he did not choose to look at them at all (RII, 82, 85).

[30]"The bank has made all of these documents available for the inspection of Mrs. Lucom's succession of attorneys" (RI, 373). The petitioner wife's reply affidavit, at the point where it dealt with those documents, did not mention their availability for inspection but only the terms under which the bank offered to part with their physical possession (RI, 370).

officer said it again in detail in deposition.[31] This provoked what petitioners' District Court briefing argued was a counteraffidavit on the point by Judge Trammell, but in this affidavit the Judge does not deny that he inspected the bank's files.[12]

(b) *The request for admissions.* Meanwhile, by request for admissions in December 1963, again after the summary judgment, the bank asserted still more specifically its offer to permit Judge Trammell to see all its files pertaining to the guardianship, and that he saw them twice in 1955, once in 1957, and on other occasions.[33] To

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[31]"A. Well, the first opportunity the plaintiffs or their counsel had to see it was when Judge Trammell came in here and wanted to see the records. We laid them before him, and the Operating File was included along with everything else. He saw the whole files when he came in here.

"Q. And precisely when was that?

"A. Way back in 1955. I can't remember the exact date" (RII, 125).

[32]This counteraffidavit, briefed by his then cocounsel as asserting that Judge Trammell "never had general access to even bank files" notwithstanding demand (RIII, 422), turns out to be the guarded statement only that no one directed the Judge's especial attention to purportedly incriminating passages of the documents he was looking at: the affiant says that the bank and its counsel "did not communicate or disclose to me all the material facts which they knew were contained in the aforesaid Exhibits" (RIII, 453).

[33]"4. The defendant bank in 1954, when Myles J. Lane was your attorney, offered to permit him, as your attorney, to inspect and examine the bank's files pertaining to the guardianship here involved without excluding any paper or document from such inspection and examination. ***

"8. The defendant bank in 1954 offered to permit your attorney Charles M. Trammell, to inspect and examine said files without any such exclusion.

"9. Your attorney, Charles M. Trammell, inspected and examined said files in May or June of 1955.

"10. Your attorney, Charles M. Trammell, inspected and examined said files in September, 1955.

"11. Your attorney, Charles M. Trammell, inspected and examined said files in January, 1957.

"12. Your attorney, Charles M. Trammell, inspected and examined said files on numerous other occasions" (RII, 10-11).

this petitioners supplied a weasel-worded response, denying not the facts of this tender and its acceptance but denying only petitioners' knowledge of those facts.[34]

The response is verified by petitioners and additionally by Judge Trammell, who swears that the response "is true and correct to the best of my knowledge and belief, and as to those matters contained therein which relate to my activities, the same are true and accurate to my own knowledge" (RII, 107-8). But his verification of the response, even as to his own activities, adds nothing to the response, because of the fact just noted, that the response itself is only a denial of knowledge rather than of fact. This is no denial at all. 4 *Moore, Federal Practice*, §36.05[4]. All the petitioners are swearing to, as to the bank's offer of inspection to this lawyer and his acceptance, is that they are ignorant of what happened; and all the lawyer swears to is that he believes petitioners are ignorant of what their other lawyers did and that he knows petitioners are ignorant of what he did. All this is doubtless literal truth, and equally doubtless evasion, on the part of both lawyer and clients, because none of the three denies the fact that such an offer was made and accepted.[35]

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[34]"4. Re request #4, plaintiffs have no knowledge of any such offer having been made, and for that reason deny same. * * * Re request #8, plaintiffs have no knowledge of any such offer having been made and for that reason deny same. Re requests 9, 10, 11, and 12, plaintiffs know of no instance when said attorney was permitted to or did 'examine the bank's files pertaining to the guardianship here involved without excluding any paper or document from such inspection and examination' and accordingly for that reason deny same" (RII, 105).

[35]We have not here belatedly seized on an inadvertence of phrasing. We made this same point in the District Court, when petitioners had opportunity to correct these papers if correctible (RIII, 594). Petitioners chose to let them stand.

(c) *The answers to interrogatories.* The petitioner wife, responding to the bank's interrogatories (not printed: see RI, 522), gave sworn answers that in some instances deny the offer of inspection (RIII, 570-3). But her general denial answer: "***no offer of general inspection was ever made" is inadmissible hearsay, viz., "*** upon information and belief" (RIII, 570); and her specific denials as to 1954 and 1961 offers (RIII, 571) do not meet the specific testimony of 1955 offer (RII, 125, supra p. 21 n. 31). At that, it is elementary that no interrogatory answers are admissible in the answering party's favor. 4 *Moore, Federal Practice,* §33.29[1].

So nowhere is there an effective evidential denial of offer of inspection and its acceptance, twice asserted under oath by affidavit and deposition and then twice evaded in counteraffidavits, and twice more evaded by response to request for admissions and by interrogatory answers.

Under any head of FRCP 60(b), to reopen a judgment there must be "due diligence timely to obtain the evidence now offered", *Knight v. Hersh,* 313 F2d 879 (D.C.Cir); *Philippine Natl. Bk. v. Kennedy,* 295 F2d 544 (D.C.Cir). Failing to look at or comprehend documents that have been all along available for the looking is not due diligence. *Gill v. United States,* 184 F2d 49 (2dCir).

(2) *The uncontradicted evidence that petitioners independently knew the facts reflected on the documents.* Even had there been contradiction or mitigation of this evidence on inspection of the bank's files, petitioners' claim as to evidence newly discovered after the summary judgment would be no better founded, for these files merely

corroborated and cumulated facts petitioners already knew. Quite apart from what their attorneys knew, petitioners personally knew these facts completely in 1963 before the 1963 summary judgment, and in essential part as far back as 1954, although the record leaves it to speculation whether in 1954 they also knew the whole or just a little less than the whole: —

As part of their own papers submitted in 1963 when they were trying to ward off the summary judgment, petitioners themselves introduced into this record a document already mentioned, supra p. 8 n. 12, viz., a partial transcript of a 1954 hearing at which the wife's personal physician had testified to the relapse, to his opinion that the relapse was in some measure the new husband's fault, and to his recommendation for personal guardianship and for possible recommitment (RI, 427, 456-7, 462-5). Within a few days of this hearing petitioners' messenger actually reported to the bank their fear that they might be "locked up" if they came back to Florida (RII, 134-5, 256).

Finally, the wife's own deposition testimony, taken in May 1963 before the summary judgment, makes plain that by the end of 1954 petitioners had already put all these pieces together and convinced themselves there was a conspiracy. In this testimony she admitted that it was in 1954 that her young daughter Isobel had reported to both petitioners that she had overheard a "private meeting" at which the son and his alleged coconspirators were plotting to put her back in the mental hospital and her new husband in jail (RI, 255-6, 294-5; see also RI, 304).

Hence although it was new to the record in 1964, after

the 1963 summary judgment, that there was documentary evidence of which petitioners were ignorant, and even assuming that that evidence—the trial judge to the contrary notwithstanding: "no fraud at all" (RIII, 609)—was fraudulently concealed and thereby hid a cause of action, the cause of action was not new to petitioners. They had known the substance if not the detail for years, and they had passed up over those years repeated tender of the detail:

> "A concealment which no longer conceals the cause of action will not continue to toll the statute, though the full facts may not yet have been disclosed", *Phillips Petro. Co. v. Johnson*, 155 F2d 185 (5thCir).

So too under Florida law, as the Court of Appeals pointed out, once the invasion of the claimed right was discovered, any tolling ceased even though the detail was not yet discovered. *Buck v. Mouradian*, 100 So2d 70 (3dDFla1958), cert. den. 104 So2d 592 (Fla1958), cited below (Pet.App. 6a).

* * *

CONCLUSION

Petitioners' attempt to use claim of constitutional infringement of the "right of those confined for reasons of mental illness" (Pet. 16), to add importance to this petty wrangle over choice of state limitation statutes, has no basis in the facts of the case. It was some nine years before start of the instant suit that the wife, the mentally ill person involved, was released from the mental hospital,

some eight years since she was adjudicated restored to competency, and some seven years since she lost the first battle in her long war on the bank (Pet. 11; RI, 70, 75). This lady has thus been for all that time free in fact and in law to vindicate her constitutional rights, and during all these years she has employed able counsel to do so.

Her accusations, rejected by the Florida courts and the courts below, fail likewise to meet the tests for exercise of this Court's certiorari jurisdiction. The decision below barring the cause of action for acting under an alleged void guardianship involves nothing but a question of state limitation law. The decision barring the causes of action for fraud and conspiracy involves nothing additional except recognition of undisputed factual detail as to petitioners' prior knowledge of alleged newly discovered evidence. None of those matters is of dimension to merit certiorari review. The petition should therefore be denied.

Respectfully submitted,

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APPENDIX

Florida Statutes, §744.03(5)[1]

An "incompetent" is any person who, because of minority, senility, lunacy, insanity, imbecility, idiocy, drunkenness, excessive use of drugs or other physical or mental incapacity, is incapable of either managing his property or caring for himself, or both.

Florida Statutes, §744.61[2]

All suits, actions or proceedings to establish the validity and amount of claims against the estate of the ward shall be brought jointly against the guardian and the ward, and in any such suit no guardian ad litem need be appointed. Suits to enforce or to declare rights of the ward shall be brought jointly in the name of the guardian and the ward. If suit is brought by the guardian against the ward or vice versa or if the interest of the guardian is adverse to that of his ward, then a guardian ad litem shall be appointed by the court to represent the ward in that particular litigation. Judgments in favor of the ward shall, upon termination of guardianship, become the property of the ward without the necessity for any assignment by the guardian or receipt by the ward. The guardian may receive payment and satisfy any judgment in behalf of the ward without any joinder of the ward.

Florida Statutes, §746.13(2)[1]

The guardian applying for discharge is authorized to retain from the funds in his possession a sufficient amount

[1]Cited supra p. 3.
[2]Cited supra p. 13.
[1]Cited supra p. 14.

to pay the final costs of administration accruing between the filing of his final returns and the order of discharge.

Pennsylvania Public Law 612, June 28, 1951, §102(3)[2]

"Incompetent" means a person, who, because of mental infirmities of old age, mental illness, mental deficiency, drug addiction or inebriety, is unable to manage his property, or is liable to dissipate it or become the victim of designing persons. It includes a person heretofore declared to be a lunatic, an habitual drunkard, insane or weak-minded.

Pennsylvania Public Law 612, June 28, 1951, §301[3]

(a) Resident. The court, upon petition and a hearing at which good cause is shown, may find a person domiciled in the Commonwealth to be incompetent and appoint a guardian or guardians of his estate. The petitioner may be the alleged incompetent's spouse, a relative, a creditor, a debtor, or, any person interested in the alleged incompetent's welfare. Notice of the petition and hearing shall be given, in such manner as the court shall direct, to the alleged incompetent, to all persons residing within the Commonwealth who are sui juris and would be entitled to share in the estate of the alleged incompetent if he died intestate at that time, and to such other parties as the court may direct. The alleged incompetent shall be present at the hearing unless (1) the court is satisfied, upon the presentation of positive testimony, that, because of this physical or mental condition, his welfare would not be pro-

[2]Cited supra p. 3.
[3]Cited supra p. 4.

moted by his presence; or (2) it is impossible for him to be present because of his absence from the Commonwealth. It shall not be necessary for the alleged incompetent to be represented by a guardian ad litem in the proceeding.

(b) Nonresident. The court may find a person not domiciled in the Commonwealth having property in the Commonwealth to be incompetent and may appoint a guardian of his estate. The appointment may be made after petition, hearing and notice as in the case of a person domiciled in the Commonwealth, or upon the submission of an exemplified copy of a decree establishing his incompetency in another jurisdiction. The court shall give preference in its appointment to the foreign guardian of the nonresident incompetent unless it finds that such appointment will not be for the best interests of the incompetent.

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IN THE

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OCTOBER TERM, 1966

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v.

ATLANTIC NATIONAL BANK OF WEST PALM BEACH, FLORIDA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Significantly, the respondent's Brief in Opposition addresses itself mainly to factual and legal matters not involved in the Fifth Circuit's opinion or in the Petition for a Writ of Certiorari. By labeling the central issue before this Court as "a minor question under state statutes of limitation" (Opp. Br. 1)

and as a "petty wrangle over choice of state limitation statutes" (Opp. Br. 26), the respondent would have this Court ignore an egregious violation of the basic principle of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64—the obligation of federal courts to follow the applicable rule of law announced by state courts.

Respondent devotes itself factually (Opp. Br. 2-8) to disputed matters whose conceivable relevance could only be determined if this case were allowed to come to trial. In terms of the limitations question resolved by the Fifth Circuit, however, there is but one indisputable and critical fact, i.e., the fact mentioned in the opinion below (Pet. App. 2a) that the guardian's final discharge did not occur until 1961, less than one year before this suit was brought. Respondent does not and cannot deny that fact. And respondent does not answer or respond to the decision of the Florida Supreme Court in *Beck* v. *Barnett National Bank*, 142 So. 2d 329 (Fla.), holding that just such a suit as this, brought by a former ward against a guardian who has been finally discharged, is controlled by the special one-year limitation period of Fla. Stat. § 746.14. The *Beck* decision thus flatly contradicts the interpretation of Florida law made by the Fifth Circuit in this case. See Petition, pp. 21-23. And that undenied conflict, without more, warrants the grant of certiorari.

There are certain additional statements and misconceptions in the Brief in Opposition that warrant summary comment:

(1) The deference which this Court normally pays to local law decisions of federal judges depends upon something more substantial than their residence in the state whose local law is in issue or their supposed ex-

perience with that law. See Opp. Br. 11. *If there is no guidance to be had from the state court decisions* and if the determination of the federal judges seems reasonable under the circumstances, this Court usually leaves undisturbed the interpretation of the federal judges who are experienced in the state law. See *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 281. But the "highest court of the state is the final arbiter of what is state law . . . [and when] it has spoken, its pronouncement is to be accepted by federal courts as defining state law . . ." *West* v. *American T. & T. Co.*, 311 U.S. 223, 236. Hence if the federal judges, experienced though they may be in local law matters, fail to follow state law as expressly defined by the highest state court, their determination must be considered plainly erroneous and clearly wrong. Such an erroneous interpretation of state law, as the *West* case illustrates with respect to a matter of state limitations law, clearly gives rise to review and correction by this Court.

(2) The major question thus presented to this Court is the correctness of the Fifth Circuit's interpretation of the Florida limitations law and its application to the undisputed facts of this case. Contrary to respondent's suggestion (Opp. Br. 11), it is necessary "to rehash the Florida case law discussed in the opinions below"—for once that "rehash" is undertaken, the completely erroneous and therefore reviewable nature of the decision below becomes clear.

In short, the Fifth Circuit failed to follow and apply the decisions of the Florida Supreme Court which hold: (a) special statutes control over general statutes, *Adams* v. *Culver,* 111 So. 2d 665; (b) the special one-year limitation period following the guardian's final discharge, as set forth in Fla. Stat. § 746.14,

thus controls here, even though for sake of argument the claim may be barred under the general limitations statute, *Beck* v. *Barnett National Bank,* 142 So. 2d 329 (Fla.); and (c) in any event, even if the general limitations statute applied and regardless of whether suit is permissible during the guardianship, a former ward can sue his former guardian in any appropriate action *after* the guardian's final discharge, which occurred here in 1961, *Beck* v. *Barnett National Bank,* 117 So. 2d 45 (Fla. App.), and 142 So. 2d 329 (Fla.); *American Surety Co.* v. *Andrews,* 12 So. 2d 599 (Fla.). This latter Florida rule, permitting suit after final discharge, was in effect long before the adoption of the special limitations statute, § 746.14, which placed a limitation of one year *after* final discharge.

(3) Moreover, as developed in the Petition, pp. 27-28, Florida law unqualifiedly provides that a void order or judgment may be attacked collaterally *at any time* and set aside in an appropriate proceeding. See, e.g., *Johnson* v. *McKinnon,* 45 So. 23 (Fla.). Here the petitioners have attacked the validity of the Florida judge's appointment of the respondent as guardian, alleging a jurisdictional lack of an authenticated adjudication of mental incompetency. Respondent's attempt (Opp. Br. 5-6) to avoid the force of that contention by reliance on *In re Cameron's Estate,* 158 Fla. 91, 28 So. 2d 110, is ill-founded. Unlike the *Cameron* case, where there was a valid out-of-state adjudication of incompetency by a court having jurisdiction over a Florida resident domiciled in the other state, there was here no adjudication of mental incompetence by any court, either in Pennsylvania or Florida, having jurisdiction over the petitioner wife. Absent such a judicial determination of incompetence,

the Florida judge lacked jurisdiction under Florida statutes (see Fla. Stat. § 744.19 and § 744.31) to appoint the respondent as guardian. And that jurisdictional defect can be attacked at any time under Florida law, there being no limitations period for such an attack.

(4) Respondent's assertion that the attack on the void guardianship comes too late by virtue of the failure to raise the issue earlier on certiorari to this Court (Opp. Br. 15) is without foundation. In point of fact, the earlier attack on the guardianship in the Florida courts was premised, as the Fifth Circuit here noted (Pet. App. 2a), solely "on the basis that the guardianship was invalid for lack of compliance with Florida law." And the Florida Supreme Court, as the Fifth Circuit further noted (Pet. App. 2a), "expressly omitted ruling on the validity of the appointment, holding that the bank was at least a guardian de facto and, as such, was entitled to be paid."

Thus there was neither an attack upon the guardianship in federal constitutional terms nor any ruling at all upon the validity of the guardianship; in those circumstances an attempt to secure certiorari from this Court would have been misplaced. The failure to make such a futile attempt certainly cannot be said to foreclose any present effort by petitioners to question the validity of the guardianship under federal standards.

(5) With respect to respondent's assertion (Opp. Br. 19) that there were no questions of fact justifying a jury determination of whether the three-year fraud limitation period was tolled by concealment, it need only be said that respondent's own version of what it calls "uncontroverted evidence" (Opp. Br. 21-26)

demonstrates the very dispute that necessitates a jury trial. Petitioners are in disagreement with substantially all of the factual assertions here made by respondent, either as a matter of accuracy or as a matter of relevance. Without a jury resolution of this dispute, there can be no assurance that the three-year fraud limitation period was or was not tolled by concealment. Under Florida law, petitioners were entitled to just that kind of a jury determination. *Metcalf* v. *Johnson,* 113 So. 2d 864 (Fla. App.).

Moreover, respondent concedes (Opp. Br. 25-26) that "there was documentary evidence [uncovered in 1964 after the 1963 summary judgment herein] of which petitioners were ignorant." Respondent then states, on the expressed assumption that this evidence "was fraudulently concealed and thereby hid a cause of action" (Opp. Br. 26), that the petitioners must have known of the "substance if not the detail" of this new evidence for many years, the matters having been "tendered" to them on numerous occasions. Such a controversial statement cannot overcome the very grave error of the Fifth Circuit in affirming the summary denial of the motion for a new trial based on this new evidence of fraud and concealment—which respondent is willing to assume may have hid a cause of action during the years in question. Whether the petitioners knew or should have known of the substance or the details of these new facts, and whether tenders of the information were actually made long prior to the institution of this suit, are matters that the District Court should have permitted a jury to determine, as Florida law requires.

(6) Finally, respondent ignores completely the significance of that portion of the ruling below that no

federal question was presented by this suit. The square conflict between that ruling and the decision of this Court in *Chaloner* v. *Sherman*, 242 U.S. 455, as detailed in the Petition, pp. 31-32, fully merits the attention of this Court.

CONCLUSION

It is not the intention of the petitioners to burden this Court with the many and irrelevant factual disputes which mark respondent's version of the case. Much of what the respondent states in its supplemental statement of the case (Opp. Br. 1-9) differs substantially from what petitioners believe to be the true and relevant facts of the case. Thus the respondent's effort (Opp. Br. 2-3) to portray the petitioner wife as mentally incompetent is not only irrelevant in the present context but is overcome by the Pennsylvania court's express refusal to find her incompetent to manage her affairs at the time in question. See Petition, p. 7. And the respondent's denial of knowledge of the illegal conspiracy (Opp. Br. 6-9) would be relevant only if and when a jury were permitted to adjudicate the newly discovered evidence indicating that the respondent did in fact know of the conspiracy and of the plan to seize the petitioner wife's property, to have her incarcerated, and to annul her marriage. None of these matters, however, is before this Court at this time.

But these disputed matters, which should be but have not been resolved by a jury, cannot hide the hard and undisputed fact that the respondent bank was not finally discharged as guardian until 1961, less than a year before the institution of this suit. Out of that plain fact emerges the questions which petitioners ask

this Court to review, questions concerning the accuracy of the Fifth Circuit's statement of the applicable Florida limitations law and the assertion of a federal cause of action. Petitioners reiterate that, in the context of a situation where the civil rights and remedies of those charged with being mentally ill are concerned, it is important for this Court to make certain that state law in this respect has been properly interpreted and applied. This is far more than a parochial matter. It is of concern to countless thousands of our citizens.

The deep gulf between the ruling below and the applicable rulings of the Florida courts respecting Florida limitations law justifies the grant of certiorari in this instance.

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PETITION FOR REHEARING

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR REHEARING

Petitioners respectfully pray that this Court grant rehearing of its Order of October 17, 1966, denying the Petition for Certiorari, that a writ of certiorari thereupon issue, and that the case be remanded to the Court of Appeals for consideration of the matters specified herein.

This Petition for Rehearing, filed pursuant to Rule 58(2) of this Court, is premised in the words of that Rule upon "other substantial grounds available to petitioner although not previously presented." See *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50; *Massey* v. *United States*, 291 U.S. 608; *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962; *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U.S. 183, and cases cited therein.

The primary basis of the opinion below, which evolved into the question presented to this Court in the Petition for Certiorari, was the ruling that Florida limitations law barred this action by a former ward and her husband against a guardian who had been finally discharged. The Petition asserted that this ruling was contrary to Florida decisions and principles announced by this Court and was so violative of the obligation of federal courts to follow applicable state law as to warrant the grant of certiorari.

Not contained in the Petition but presented to and avoided by the Court of Appeals, however, was an even more fundamental question going to the very efficacy of that court's ruling as to the applicability of Florida limitations law. That ruling, which affirmed the summary judgment entered by the District Court, found that there were no genuine issues of material facts relative to the limitation matters. That finding of fact was misfounded. Indeed, not only does the record demonstrate innumerable disputes of material facts but the major contention advanced by the petitioners to the Court of Appeals was that the existence of these disputed matters made the entry of summary judgment improper and deprived petitioners of their right to a jury trial of such disputed matters, in ac-

cordance with the Seventh Amendment. Yet the Court of Appeals did not decide that issue. It ignored that jury-trial contention and proceeded to rule that the suit was barred by limitations on the basis of the disputed version of the facts advanced by the respondent. That these facts were in dispute is obvious from a most cursory examination of the record:

1. There was a serious dispute as to when the decisive accounting and discharge of the guardian took place, the determination of which was crucial to the commencement of the limitations periods. The courts below summarily ruled that such accounting and discharge occurred on March 25, 1955, whereas the record shows and petitioners contend that that accounting as shown by its terms was only a periodic accounting and that the *final* accounting and discharge did not take place until 1961, after the Florida Supreme Court had reversed and substantially modified the 1955 accounting. While the Court of Appeals recognized that the final discharge occurred in 1961, it still relied upon the 1955 conditional order for purposes of the running of the limitations periods. Thereby the petitioners were deprived of their right to a jury determination as to the disputed nature and effect of the 1955 order and as to the beginning date of limitations.

2. The Court of Appeals made its own finding that the *fact of fraud* was known to petitioners as far back as 1955, thereby causing the fraud limitations period to run from that date. But petitioners vigorously denied that they were aware of the fraud as of that date. And they were at no time allowed to present proof before a jury in order to obtain a resolution of this highly disputed subjective factor concerning petitioners' knowledge and awareness.

3. The assertion of the Court of Appeals (Pet. App. 7a) that "virtually all the facts relied upon here as constituting the fraud were asserted in that [collateral] proceeding" in the Florida courts involving the guardian's accounts overlooks the assertion and the fact that such matters were not presented to the Florida courts in those collateral proceedings. No allegations of fraud were presented to the state courts and the Florida Supreme Court opinion reveals no existence of such issues. See Pet. App. 25a. Thus a material fact question concerning the prior proceedings was resolved against petitioners without affording them any opportunity to be heard before a jury respecting their version of the facts and the proceedings. Cf. *Free* v. *Bland,* 369 U.S. 663, 671 ("no issue of fraud was or could properly have been decided by the court below on summary judgment").

4. In addition, there was a disputed factual issue as to whether the respondent concealed evidence from the petitioners, evidence which would have proved a cause of action for conspiracy and which would have shown a plan to annul petitioners' marriage, return the wife to a mental hospital, and gain control of her property. In the record before the court below is a sworn denial by one of respondent's officers that the respondent had any knowledge of a plan to return the wife to the hospital or to undertake proceedings against the husband. At R. III 511 is contained that officer's statement that he

> ". . . was never present at any conference . . . during which alleged discussions were supposed to have been had concerning taking her back to the Philadelphia hospital and undertaking proceedings against Wilson C. Lucom for his having

> taken her from Florida while she was under the jurisdiction of the Probate Court."

This was affirmed by the officer to be "the whole truth." He reiterated that no one had ever "asked if we [the bank] would join them in such proceeding . . . at the time it was supposed to have been discussed, I knew nothing about it at all." *Ibid.* Yet newly-discovered evidence submitted by petitioners in 1964 showed that in the files of the respondent bank at the time in question there was a petition for adjudication of incompetency prepared by the bank's attorneys while the bank was already guardian of the person. R. II 19ff., 112 ff., 133. Also in those files was a 1954 notation to this effect (R. III 517-518):

> "We were informed that Mrs. de Landa [the petitioner wife] had suddenly married Charles Lucom of Washington, whom she had known only a matter of days. We were, also, informed that John de Aguirre [her son] had arrived from Tampa, and that a hearing was scheduled to be had at 3:00 P.M. Tuesday, June 1, during which it was expected that Dr. Ombres would testify as to Mrs. de Landa's present condition and request that his petition to have her restored be withdrawn. *It is our further understanding that following this procedure John de Aguirre will apply to the Court for letters of guardianship* of the person of Mrs. de Landa and *take such steps as may be necessary to have the marriage annulled.*" [Italics supplied].

Had this evidence been considered by a jury, it might well have found that the respondent had concealed significant evidence of fraud so as to toll the start of any limitations period until petitioners did in fact discover this evidence. Yet the summary ruling be-

low, which refused to reopen the summary judgment to permit consideration of this new evidence, precluded that jury determination.

The right to a jury trial in federal courts in diversity actions where there are disputed issues of fact stems directly from the Seventh Amendment. And as stated in *Simler* v. *Conner,* 372 U.S. 221, 223, this "federal policy favoring jury trials is of historic and continuing strength." It is the jury, not the court, which is the fact-finding body in the federal courts. See *Wilkerson* v. *McCarthy,* 336 U.S. 53, 63-64. Where there are issues of fact that can only be resolved by a jury, it is error to award summary judgment and thereby deprive the losing party of "the jury trial guaranteed him by the Seventh Amendemnt." *Simler* v. *Conner, supra,* 223. That is the important principle at stake here, the principle that justifies the grant of rehearing and the remand of the case to the Court of Appeals.

CONCLUSION

For these reasons, the Order of October 17, 1966, denying certiorari, should be vacated and the matter remanded to the Court of Appeals for consideration and resolution of the questions presented herein.

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CERTIFICATE OF COUNSEL

We hereby certify that this Petition for Rehearing is filed in good faith and not for delay and that the Petition is restricted to the grounds set forth in Rule 58 of this Court.

CHARLES M. TRAMMELL
EUGENE GRESSMAN

November 10, 1966.